STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

ZACHARY LANGDON,

Petitioner,

vs.

SYRACUSE UNIVERSITY,

Respondent.

Index No. SU-2018-8000

Hon. James P. Murphy

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S VERIFIED ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

Respondent Syracuse University ("the University") submits this memorandum of law in opposition to the Verified Petition ("Petition") of Petitioner Zachary Langdon ("Petitioner") pursuant to New York Civil Practice Law and Rules ("CPLR") § 7804(f).

The University afforded Petitioner more process than was required by law and adhered to the disciplinary process set forth in the Student Conduct System Handbook ("SCSH"). Petitioner received formal charges; had those charges subsequently explained to him; had an opportunity to be heard at a hearing; and subsequently took advantage of the internal appeal process. Because the University is a private university not subject to the constitutional limitations applicable to a public university, the well-settled law imposes no further procedural obligations on the University. As to the handful of instances in which Petitioner alleges that the University failed to follow the SCSH, the University submits that, in each instance identified in the Petition, neither the law nor the SCSH required the process suggested by Petitioner, and that the University otherwise adhered to the SCSH.

For these reasons and those set forth more fully below, the University respectfully requests that the Petition be dismissed.

STATEMENT OF FACTS

The University refers the Court to the Counterstatement of Material Facts set forth in the University's Verified Answer with Objections in Point of Law, the Certified Record, the Affidavit of Pam Peter dated March 1, 2018, the Affidavit of Katie Newcomb dated March 1, 2019, the Affidavit of Ammar Asbahi dated March 1, 2019, the Affidavit of Edward Weber dated March 1, 2019, the Affidavit of Tyrone Reese dated March 1, 2019, and the affidavit of Ron Novack dated March 1, 2019.

ARGUMENT

I. THE UNIVERSITY AFFORDED PETITIONER MORE PROCESS THAN WAS REQUIRED BY LAW.

In contrast to public universities, a court's review of a private university's disciplinary decision through an Article 78 proceeding is "much more limited, and private universities are generally given broad discretion in matters such as discipline against students." *Doe v. Cornell Univ.*, 59 Misc. 3d 915, 924 (Sup. Ct. Tompkins Cnty. Dec. 15, 2017), aff'd, 163 A.D.3d 1243, 1244-45 (3d Dep't 2018) ("Where, as here, no hearing is required by law, a court reviewing a private university's disciplinary proceedings must determine whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious.") (internal quotations omitted); see also *Aryeh v. St. John's Univ.*, 154 A.D.3d 747, 747-48 (2d Dep't 2017); *Jones v. Trs. of Union Coll.*, 92 A.D.3d 997, 998-99 (3d Dep't 2012); *Ebert v. Yeshiva Univ.*, 28 A.D.3d 315, 315 (1st Dep't 2006); *Fernandez v. Columbia Univ.*, 16 A.D.3d 227, 228 (1st Dep't 2005); *Al-Khadra v. Syracuse Univ.*, 291 A.D.2d 865, 866 (4th Dep't 2002); *Rensselaer Soc'y of Eng'rs v. Rensselaer Polytechnic Insts.*, 260 A.D.2d 992 (3d Dep't 2001); *Dalmolen v. Elmira Coll.*, 279 A.D.2d 929, 932 (3d Dep't 2001); *Mu Chapter of Delta Kappa Epsilon v. Colgate Univ.*, 176 A.D.2d 11, 13-14 (3d Dep't 1992); *Galiani v. Hofstra Univ.*, 118 A.D.2d 572, 572 (2d Dep't 1986).

The Fourth Department has recognized in recent years that there exists an important distinction between public and private universities in the context of judicial review of student disciplinary proceedings. *See Ponichtera v. State Univ. of N.Y. at Buffalo*, 149 A.D.3d 1565, 1565-66 (4th Dep't 2017) ("In a case such as this involving a public university, due process requires that the petitioner be given the name of the witnesses against her, the opportunity to present a defense, and the results and finding of the hearing.") (emphasis added); *Budd v. State*

Univ. of N.Y. at Geneseo, 133 A.D.3d 1341, 1342 (4th Dep't 2015) (noting that "[a] public university . . . must 'provide its students with the full panoply of due process guarantees. . . .'") (emphasis added). The Court of Appeals has also recently distinguished the protections to be afforded by public and private universities, stating, "A student subject to disciplinary action at a private educational institution is not entitled to the 'full panoply of due process rights.' Such an institution need only ensure that its published rules are 'substantially observed.'" *Matter of Kickertz v. New York Univ.*, 25 N.Y.3d 942, 944 (2015) (internal citations omitted).

As long as the "determination to suspend the petitioner was rendered in accordance with the university's published regulations, and based upon the exercise of honest discretion after a full review of the operative facts, it [is] neither arbitrary nor capricious so as to warrant judicial intervention." *Galiani v. Hofstra Univ.*, 118 A.D.2d at 572 (internal citations omitted). For example, in *Fernandez v. Columbia University*, a case sufficiently analogous to the instant action, the court dismissed the petition, finding:

> Petitioner was found to have sent harassing communications to and about several fellow students at respondent's business school. The record confirms that prior to making its findings against petitioner and imposing disciplinary sanctions, respondent afforded petitioner notice of the charges against him and an opportunity to be heard; that petitioner was thereafter provided an opportunity to take an internal appeal; and that in proceeding against petitioner respondent substantially abided by its own governing rules and regulations. In the context of disciplinary proceedings respecting nonacademic matters instituted by a private educational institution, petitioner was not entitled to more in the way of process.

16 A.D.3d at 228.

Here, Petitioner received written notice of the charges from the University's Office of Student Rights and Responsibilities ("OSRR") on February 9, 2018 and again on March 16, 2018. *See* Petition, ¶ 17; R.42 – R.43, R.49 – R.50. Following receipt of the February 9, 2018

letter, at Petitioner's request, OSRR explained the charges to Petitioner during a meeting on February 11, 2018. *See* Petition, ¶ 19; Peter Aff., ¶ 19. Then, following the issuance of the March 16, 2018 letter, Petitioner had an opportunity to be heard at a hearing before the University Conduct Board ("UCB"). *See* Petition, ¶¶ 22, 24; R.1 – R.7. Petitioner subsequently took advantage of the University's internal appeal process. *See* Petition, ¶ 41; R.8 – R.12. Thus, a review of the process employed here demonstrates that Petitioner received *more* process than was required by law. *See Rensselaer Soc'y of Eng'rs,* 260 A.D.2d at 994 ("[T]he relationship between a private university and its students . . . is essentially a private one such that . . . their disciplinary proceedings do not implicate the full panoply of due process guarantees.") (internal quotation marks omitted); *Cornell Univ.*, 163 A.D.3d at 1244-45.

Petitioner's reliance on *Ryan v. Hofstra University* to suggest otherwise is misplaced. In that case, a student accused of throwing rocks through the bookstore window was summarily expelled, barred, and fined. 324 N.Y.S.2d 964, 968 (Sup. Ct. Nassau Cnty. 1971). In finding that the student was not afforded due process, the court noted the following departures from due process as troubling, none of which exist here:

- Since [the student's] classes had ended for the summer, and his acts, if any, were isolated to him, there appeared no need for the summary expulsion action taken, in the absence of a full and fair hearing or time to prepare for one. The hearing on which expulsion was based was had the day after the incident, without reasonable inquiry of [the student's] mental responsibility for his conduct, in view of the administration's claim of purported emotional or psychological disturbance.

- The administration failed to follow its own rules in giving [the student] a choice of appearing before the student judiciary board forum.

- The administration's unreasonable delay in affording review proceedings effectively fixed a significant punishment on [the student] even were his appeal to be entirely successful.

- The assessment of a monetary fine over $1,000 and barring [the student's] procurement of his college transcript for transfer purposes until it is paid was in absence of a fair hearing and opportunity of representation by his own counsel. His family, sought to be fined, was not heard and did not assume his liability, if any.

- The Hofstra review procedure is fatally defective in the context of an expulsion proceeding.[1]

Id. at 986-87. Unlike in *Ryan*, Petitioner was afforded a hearing, with more than adequate time to prepare;[2] the University adhered to the disciplinary process outlined in the SCSH, as set forth more fully in Section 3, *infra*; the University did not delay its review proceedings; the University did not assess a monetary fine on Petitioner, let alone on his family; the punishment sought was suspension, rather than expulsion; and there was no parallel criminal or civil court case pending. As there were no sexual misconduct allegations, Part 10 of the SCSH was not implicated, and therefore Petitioner was not entitled to legal representation at any stage in the disciplinary proceeding. *See* R.26, R.28 – R.30.

II. THE UNIVERSITY IS NOT SUBJECT TO THE CONSTITUTIONAL LIMITATIONS PLACED UPON STATE ACTION.

In a conspicuous attempt to sidestep the well-established legal framework applicable to private universities, set forth in Section 1, *supra*, Petitioner relies primarily on cases involving public universities, to which the Fourteenth Amendment of the United States Constitution applies, and suggests that the University should similarly be held to that heightened due process standard. Petitioner bases that assessment on the grounds that it is (1) "heavily intertwined with the federal and state government," (2) "operates in a quasi-state capacity in connection with

[1] The court in *Ryan* found that due process in an *expulsion* matter required the right of counsel, particularly under the circumstances where Hofstra's disciplinary procedure afforded employees of the administration, but not students, the choice of counsel and further administrative review by the board of trustees.

[2] Petitioner received written notice of charges from OSRR on February 9, 2018 (R.42 – R.43, was provided further information regarding those charges in a meeting with OSRR on February 11, 2018 (Peter Aff., ¶ 19), and received written notice of the charges again on March 16, 2018 (Petition, ¶¶ 17, 20; R.49 – R.50). The UCB hearing occurred on March 27, 2018, nearly two months after Petitioner first received notice of the charges against him. *See* Petition, ¶ 22; R-1 – R-7, R-42 – R-43.

Petitioner's relationship by participating in the Army ROTC program scholarship," and (3) "adopted a 'bill of rights' provides for "fundamental fairness" in the hearing process. Petitioner's Memorandum of Law, pp. 13-15, 19-20. As such, Petitioner argues, he "should be entitled to the full panoply of due process protections afforded by the United States and New York constitutions." *Id.* at p. 20. Petitioner's arguments are unavailing and unsupported by legal authority.

"Courts have consistently refused to apply the 'State action' doctrine or extend due process rights to students attending private universities." *Miller v. Long Island Univ.*, 85 Misc.2d 393, 397 (Sup. Ct. Kings Cnty. 1976) (citing cases). "[R]eceipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Grossner v. Trustees of Columbia Univ. in City of N.Y.,* 287 F. Supp. 535, 547-548 (S.D.N.Y. 1968) (noting that, "[o]therwise, all kinds of contractors and enterprises, increasingly dependent upon government business . . . would find themselves charged with 'state action' in the performance of all kinds of functions we still consider and treat as essentially 'private' for all presently relevant purposes."); *see also Wahba v. New York Univ.*, 492 F.2d 96, 102-103 (2d Cir. 1974) (declaring that a private university which receives Federal or State moneys does not thereby automatically become an agency or instrumentality of government).

"State involvement sufficient to transform a 'private' university into a "State" university requires more than merely chartering the university, providing financial aid in the form of public funds, or granting tax exemptions." *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971) (internal citations omitted); *see also Fischer v. Driscoll*, 546 F. Supp. 861, 867 (E.D. Pa. 1982) ("The administration of a student financial aid program in which some students receive monetary assistance from the federal government exists at nearly every university in the nation."); *Weise v.*

Syracuse Univ., 553 F. Supp. 675 (N.D.N.Y. 1982) (finding that tax exempt status, financial involvement, and governmental regulation, without more, do not constitute state action).

The circumstances here, even as alleged by Petitioner, differ considerably from the narrow situations in which courts have found that a private university exists as largely a governmental manifestation. *Cf. Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Ryan*, 324 N.Y.S.2d at 977-83. Moreover, contrary to Petitioner's arguments, *see* Petitioner's Memorandum of Law, p. 20, a private university is not subject to the constitutional limitations placed upon State action simply by operating "through grants, participati[ng] in student loan programs, and the establishment of the OSRR under guidance from the United States Department of Education, . . . [and] participating in the Army ROTC scholarship program." *See, e.g., Fischer*, 546 F. Supp. at 866 ("[R]egardless of the specifics of Villanova's student aid program or the operation of ROTC on campus, the plaintiff has failed to articulate a plausible theory of federal action in this case"). Here, as was the case in *Fischer*, "[s]uch an arrangement . . . can hardly be characterized as a joint venture on the part of . . . government and the university." *Id.*

Equally unpersuasive is Petitioner's argument that the "fundamental fairness" described in the University's Statement of Student Rights and Responsibilities imposes upon the University an obligation to afford its students "the full panoply of due process protections" in disciplinary proceedings. A general statement of policy, which is aspirational in nature, does not create the equivalent of constitutional due process obligations or otherwise form the basis for a breach of contract claim. As was the case in *Ebert v. Yeshiva University*, "[t]he 'fundamental fairness' promised by this private university's disciplinary rules is circumscribed by the informal processes and limitations described therein, and was not intended to afford petitioner the full panoply of due process rights." 28 A.D.3d at 315 (noting that "Respondent proceeded in

accordance with those rules, which it 'substantially observed,' and petitioner has no claim for denial of due process.") (internal citations omitted).

Other courts have similarly rejected arguments concerning "fundamental fairness," particularly in the context of a private university's student disciplinary proceedings. *See Doe v. Skidmore Coll.*, 152 A.D.3d 932, 934-35 (3d Dep't 2017) ("Petitioner's claims as to fundamental fairness are without merit as respondent is not a public university."); *Hall v. Hofstra Univ.*, 2018 N.Y. Misc. LEXIS 1314, at *34 (Sup. Ct. Nassau Cnty. Apr. 3, 2018) ("[T]he Petitioner's claims that the University's disciplinary process lacked fundamental fairness and did not comply with applicable law are without merit. . . . The Petitioner's arguments are rejected as the Respondent, University, is not a public university.").

From a contract perspective, though it is recognized that, "[i]n certain situations, a student may sue his college for a breach of implied contract," it remains equally true that "when a disciplinary dispute arises between the student and the institution, judicial review of the institution's actions is limited to whether the institution acted arbitrarily or whether it substantially complied with its own rules and regulations." *Rolph v. Hobart & William Smith Colleges*, 271 F. Supp. 3d 386, 405 (W.D.N.Y. 2017) (citing *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 207 (W.D.N.Y. 2013)). "[A] student asserting a breach of contract claim must identify the specific terms of the implied contract that were allegedly violated by the college (such as an internal rule, regulation, or code), and failure to do so is fatal to the claim." *Id.* at 405-06 (citing *Jones*, 92 A.D.3d at 998-99). "Not all terms in a student handbook are enforceable contractual obligations, . . . and courts will only enforce terms that are 'specific and concrete.'" *Id.* at 406 (quoting *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 709 (D. Vt. 2012)). Notably, "general statements of policy" or "broad pronouncements" of compliance with

existing laws, "'promising equitable treatment of all students,' cannot provide the basis for a breach of contract claim." *Id.* (quoting *Ward v. N.Y. Univ.*, 2000 U.S. Dist. LEXIS 14067, at *11-12 (S.D.N.Y. Sept. 28, 2000); *see also Faiaz v. Colgate Univ.*, 64 F. Supp. 3d 336, 359-60 (N.D.N.Y. 2014) (finding that an alleged violation of the requirement that "standards of consistency and equity [in disciplinary proceedings] are maintained" could not form the basis of a breach of contract claim); *Knelman*, 898 F. Supp. 2d at 709 (finding that "[l]anguage in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school's 'ideals,' 'goals,' or 'mission,' is not enforceable," including general promises about ethical standards); *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998) (finding that a provision of code of conduct that provides "all students should receive fair and equal treatment" was "merely a general statement of adherence . . . to existing anti-discrimination laws" and did "not create a separate and independent contractual obligation").

In *Rolph*, for example, the student argued that the contract with the college impliedly included the requirement that the college provide him "with an investigatory and adjudicatory process that was 'essentially fair.'" 271 F. Supp. 3d at 406-08 (noting that the student alleged that the college made "express and implied promises, including the guarantees of fundamental fairness, and the implied covenant of good faith and fair dealing"). The court found that, although plaintiff listed "various alleged breaches of the Student Handbook," he failed to "identify any specific terms of the implied contract that were violated." *Id.* at 407 (citing *Prasad v. Cornell Univ.*, 2016 U.S. Dist. LEXIS 161297, at *64 (N.D.N.Y. Feb. 24, 2016)). The court also found that, absent any specific provision that was violated, the plaintiff's claims for breach of contract appeared to arise out of various aspirational statements in the student handbook,

which, as a matter of law, do not provide a valid basis for a breach of contract claim. *Id.* at 407 (internal citations omitted).

Similarly, here, Petitioner alleges that various procedural protections were lacking, yet in each instance, as set forth in Section III, *infra*, the SCSH does not require the process alleged by Petitioner, and the University otherwise fully adhered to the SCSH. There was no violation of a specific, enforceable provision of the SCSH, and the broad, aspirational statement of "fundamental fairness" promised by the University is defined and restricted by the procedures subsequently described within the SCSH, which satisfy the process required under New York law. *See Ebert*, 28 A.D.3d at 315.

Lastly, to the extent there is any doubt as to whether the University should be considered a private university for purposes of this proceeding, the decisions in *Weise v. Syracuse University* and *McRae v. Sweet*, 1991 U.S. Dist. LEXIS 18260 (N.D.N.Y. Dec. 13, 1991), both held that *Syracuse University* cannot be considered a State actor. For these reasons, the University respectfully submits that, because "there has been no showing of State involvement here, [this Court's] inquiry is limited to whether [the University] substantially complied with its published guidelines or rules regarding procedures in a disciplinary proceeding." *Mu Chapter of Delta Kappa Epsilon*, 176 A.D.2d at 13-14.

III. THE UNIVERSITY ADHERED TO THE SCSH.

Petitioner alleges only a handful of instances in which the University allegedly failed to comply with the SCSH, and he instead primarily argues that the process provided by the University was inadequate. For the reasons set forth above, Petitioner's primary argument runs contrary to well-settled law. *See Cornell Univ.*, 163 A.D.3d at 1244-45; *Fernandez*, 16 A.D.3d at 228; *Rensselaer Soc'y of Eng'rs*, 260 A.D.2d at 994; *Galiani*, 118 A.D.2d at 572. As to the handful of instances of alleged non-compliance, the University submits that, in each instance,

neither the law nor the SCSH required the process suggested by Petitioner, and the University otherwise adhered to the SCSH.

Before addressing Petitioner's specific alleged instances of non-compliance, the University maintains that an overview of the disciplinary process set forth in the SCSH, when considered in connection with the process that occurred in this case, demonstrates the University's adherence, at all times, to the SCSH. Student conduct cases at the University generally proceed as follows pursuant to the SCSH:

1. A complaint of misconduct is made "by any member of the University community" including a student, faculty member, or staff member." (R.23).

2. An investigation is conducted, if necessary. (R.23 – R.24).

3. Notice of the disciplinary charges is provided to the accused student, together with an invitation to attend an informal resolution meeting. (R.24).

4. OSRR conducts an informal resolution meeting. (R.23).

5. If an informal resolution is not reached, OSRR convenes a UCB to hold a formal hearing. (R.24 – R.28).

6. OSRR sends the accused student written notice of the charges, the date, time, and location of the hearing, and the hearing procedures. (R.25).

7. A hearing is held at which the complainant presents information, the responding student is permitted to indirectly question the complainant, and the respondent student presents information and any witnesses. (R.27 – R.28).

8. The UCB's written decision is issued to the parties. (R.28).

9. An appeal to the University Appeals Board ("UAB") is permitted. (R.35 – R.36).

10. The UAB's written decision is issued to the parties. (R.36).

Petitioner's own allegations, and the record in this case, show that his disciplinary case proceeded in accordance with the SCSH as follows:

1. The Department of Public Safety ("DPS") received a report concerning Petitioner, and following further investigation, filed a complaint against him. (R.41, R.147 – R.205).

2. DPS investigated the complaint by meeting with Petitioner, alleged victims, and witnesses, reviewing the documentary evidence, and obtaining written statements. (R.41, R.147 – R.205; Asbahi Aff., ¶ 16).

3. OSRR notified Petitioner of the charges against him and invited him to participate in an informal resolution meeting. (R.42 – R.43).

4. OSRR conducted an informal resolution meeting with Petitioner. (R.44 – R.45).

5. After failing to reach an informal resolution, OSRR convened a UCB to hold a formal hearing. (R.1 – R.7, R.46; Newcomb Aff., ¶¶ 4-5, 8).

6. OSRR sent Petitioner written notice of the charges, the date, time, and location of the hearing, and the hearing procedures. (R.49 – R.50; Newcomb Aff., ¶ 6).

7. A hearing was held at which DPS presented information, Petitioner indirectly questioned DPS, and Petitioner presented information in support of his defense. (R.1 – R.7; Newcomb Aff., ¶ 10).

8. The UCB's written decision was issued to the parties. (R. 56 – R.65, R.258 – R.261).

9. Petitioner appealed the UCB's decision to a UAB. (R.66, R.262 – R.292).

10. The UAB's written decision was issued to the parties. (R.69 – R.76, R.294 – R.297).

Accordingly, the evidence proves that the University adhered to its policies and procedures in Petitioner's case. Once the Court finds that a private university substantially complied with its disciplinary process and procedures, the Court's inquiry is concluded. *See, e.g., VanHouten v. Mount St. Mary Coll.*, 137 A.D.3d 1293, 1295 (2d Dep't 2016). Nevertheless, because Petitioner raises other, more specific instances of alleged non-compliance, the University responds to each argument, in turn, below.

A. The University provided Petitioner with a proper statement of the charges.

Petitioner alleges that the written notice charges provided to him were insufficient and, therefore, in violation of the SCSH. *See* Petition, ¶¶ 17-19. The SCSH provides, in pertinent part, that, "[p]rior to a formal hearing," the student "will be given written notice of the charges stating: the alleged facts upon which the charges are based, the sections of the Code of Student Conduct alleged to have been violated, the procedures to be used in resolving the charges, and the date, time, and location of the hearing." R.25. The record proves that the University's written notice of charges provided all of the required information and, therefore, adhered to the SCSH. *See* R.25, R.49 – R.50.[3]

However, even assuming, *arguendo*, that the SCSH required more detailed "facts upon which the charges are based," which the University disputes, Petitioner admittedly received sufficient notice of the charges being asserted against him when, "[o]n or about February 11, 2018," he "went to OSRR's offices to find out what the charges were about" and was "told" about each of the allegations made by other students against him. *See* Petition, ¶ 20; Peter Aff., ¶ 19.

B. The University provided Petitioner with a clear statement of findings of fact and the evidence relied upon by the UCB in reaching its determination.

Petitioner contends that the University failed "to provide findings of fact and specify the evidence upon which it relied." Petitioner's Memorandum of Law, pp. 24-28. This contention is rebutted by the record before the Court. Following the UCB hearing, OSRR provided a letter to Petitioner, dated April 3, 2018, which, among other things, stated as follows:

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[3] Contrary to Petitioner's argument that the charges "did not provide *any* information with which Petitioner could understand the charges that were being asserted against him," *see* Petition's Memorandum of Law, p. 23 (emphasis added), the University's written charges included a statement that "this complaint arises from an incident occurring on or about December 8, 2017, when it is alleged that you used language that harassed and threatened students in your residential hall over the course of a semester." R.49 – R.50.

> The Board found that on or about December 8, 2017, you threatened and harassed members of your residence hall community by your actions and the language you used. You contributed to a culture of bullying others by placing trash cans in front of people's doors. You made obscene and bias-related comments to various individuals on the floor, including "your boyfriend's tits are bigger than yours" and "really, the black girl anthem." In addition, you drew a swastika during a game played in a public lounge area. These behaviors, along with your attempt to discover who initially reported your behavior for an earlier incident, led to a [sic] unsafe environment for fellow students living in your residence hall.

R.56 – R.58. Petitioner also received a copy of the UCB's decision, which provided, *inter alia*, the following:

- a description of items provided in the case file for consideration by the UCB;
- a statement of facts, which includes an overview of the pertinent Code of Conduct provisions, the parties' respective arguments, and the evidence relied upon by each party during the hearing;
- the UCB's factual findings, which includes a description of facts determined by the UCB, a credibility evaluation, a description of information presented during the hearing but not considered by the UCB, and a case analysis; and
- the UCB's decision, which includes a summary of the finding of responsibility, a detailed explanation of the UCB's rationale for its decision with respect to each Code of Conduct violation, the UCB's recommendation for sanctions, and the UCB's rationale for determining sanctions.

R.59 – R.65; Peter Aff., ¶ 27. As to the UCB's specific "findings of fact," which, pursuant to § 5.3 of the SCSH (R.23), were determined based on the preponderance of the evidence standard of proof, the UCB's decision included the following:

- Throughout the fall 2017, [Petitioner] was involved in several incidents involving bullying, making discriminatory comments to specific individuals, and engaging in offensive dialogue and games in common areas of the hall.

- [Petitioner] bullied students on his residence hall floor by placing [a] trash can outside the doors of their rooms as well as the public restrooms they are using.

- [Petitioner] was aware that apples were being placed on a resident's door who is allergic to apples.

- [Petitioner] made anti-Semitic and sexist comments throughout the course of the fall 2017 semester.

- [Petitioner] played the game "Quiplash" with his friends in the common lounge area on his floor of the residence hall.

- During a game of Quiplash, [Petitioner] drew swastikas and engaged in offensive dialogue with other students.

- During a fire alarm, [Petitioner] made an inappropriate comment regarding school shootings.

- [Petitioner] made a statement saying there should be a Hiroshima Day to celebrate the bombing of Japan.

- [Petitioner] made the comment, "really, the black girl anthem" to a group of black women regarding their music choices.

- [Petitioner] made the comment, "your boyfriend's tits are bigger than yours" to a female student in his residence hall.

- After he was reported for inappropriate racial comments, [Petitioner] attempted to determine who wrote the report by speaking to at least two people on his floor to obtain the identity of who reported him.

- Students on [Petitioner's] floor were scared to come forward with information. Students felt mentally and physically threatened based on the behavior of [Petitioner] and other students involved, and were hesitant to do anything to cause retaliation.

R.4; Newcomb Aff., ¶ 15.

Further, as set forth in the UCB's decision, the evidence relied upon by the UCB in reaching its decision included the case file (i.e., DPS and Office of Residence Life ("ORL") incident reports, student statements, text messages, photographs, the appointment letter,

information resolution meeting notes, the hearing referral form, and the hearing notification) and both the complainant's and Petitioner's testimony during the hearing. R.1 – R.7; Newcomb Aff., ¶¶ 9-10.[4]

Thus, the record proves that the University provided Petitioner with a clear statement of findings of fact and the evidence relied upon by the UCB in reaching its determination. The cases relied upon by Petitioner in this regard—*Boyd v. State University of New York at Cortland*, 973 N.Y.S.2d 413 (3d Dep't 2013), *Nawaz v. State University of New York, University at Buffalo School of Dental Medicine*, 744 N.Y.S.2d 590 (4th Dep't 2002), and *Kalinski v. State University of New York at Binghamton*, 557 N.Y.2d 577 (3d Dep't 1990)—are unavailing, and furthermore, all involve public universities, which, as set forth in Section 2, *supra*, are subject to constitutional limitations not applicable here.

C. The UCB's reliance on "hearsay evidence" was not improper.

Petitioner also takes issue with the fact that hearsay evidence was admitted during the hearing, *see* Petition, ¶ 21, but again, this is not inconsistent with, or otherwise in violation of, the SCSH. *See* R.25 ("Any information or statement may be admitted (including hearsay) subject to the discretion of the hearing Board chairperson"), R.27 ("University Student Conduct System hearings are administrative, rather than criminal or civil, in nature. Rules of evidence . . . do not apply").

"The rules of evidence that bind courts in New York State do not control under [the University's] rules." *Yong Won Choi v. Columbia Univ.*, 2012 N.Y. Misc. LEXIS 5502, at *5 (Sup. Ct. N.Y. Cnty. Dec. 5, 2012) (holding that respondent's findings concerning petitioner's misconduct were sufficient to support his dismissal despite being based solely on hearsay

[4] Notably, rather than present any factual witnesses to testify or submit other evidence on his behalf, as was his right under §§ 7.3, 7.10, 8.1, and 9.1 of the SCSH (R.25 – R.27, R.49 – R.50), Petitioner chose to rely solely on his own testimony and the case file (R.1 – R.7; Newcomb Aff., ¶ 10).

statements and petitioner's own admissions); *see also Hall*, 2018 N.Y. Misc. LEXIS 1314, at *34 ("In school disciplinary proceedings, a private university's interviews concerning witnesses' accounts of statements are admissible, even if such statements constitute hearsay being offered for the truth of the matter asserted."); *Al-Khadra*, 291 A.D.2d at 866 (finding that petitioner was afforded his right to "face the opposing party and to ask questions" consistent with the Judicial System Handbook even though it was the sergeant in DPS, rather than the accuser(s), who testified at the disciplinary hearing).

The Fourth Department's recent decision in *Budd v. State University of New York* expressly dealt with a determination based solely on hearsay:

> Finally, we reject petitioner's further contention that he was denied due process because his disciplinary hearing consisted solely of hearsay evidence and he was denied the opportunity to confront live witnesses. "[T]he rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents," and "[t]he lack of confrontation [does] not violate the [Code], which provide[s] for a nonadversarial fact-finding hearing 'without being unnecessarily formal or legalistic.'"

133 A.D.3d 1341, 1343-44 (4th Dep't 2015) (internal citations omitted). Notably, the Fourth Department in *Budd* rejected the petitioner's contention even under the more stringent due process requirements applicable to public universities, which are not applicable here.

Petitioner's reliance on *Hill v. State University of New York at Buffalo*, 163 A.D.3d 1454 (4th Dep't 2018), is misplaced. Not only does that case involve, yet again, a public university, but further, unlike in *Hill*, where the university's determination in that case rested "exclusively on [one] 'seriously controverted' hearsay statement, *id.* at 1455, the *multiple* statements relied upon by the UCB are sufficiently probative and cannot reasonably be considered "seriously controverted" because Petitioner admits to most of the misconduct, albeit, in each instance, with

an excuse or rationale for his behavior.[5] As such, unlike in *Hill*, there exists a rational basis for the University's determination based on the record before the Court. *See Agudio v. State Univ. of N.Y.*, 164 A.D.3d 986, 988 (3d Dep't 2018) (noting that "administrative determinations may be based entirely on hearsay evidence as long as 'such evidence is sufficiently relevant and probative or sufficiently reliable and is not otherwise seriously controverted'").

D. Petitioner's conduct did not constitute protected free expression.

Petitioner argues that his statements were protected by the University's so-called "free speech guaranty" set forth in its Statement of Student Rights and Responsibilities. However, the SCSH specifically subjects students to punishment for any statement or conduct—irrespective of free speech implications—that threatens the mental or physical health of any other person. *See* R.16 – R.17 ("Students have the right to express themselves freely on any subject provided they do so in a manner that does not violate the Code of Student Conduct. Students in turn have the responsibility to respect the right of all members of the University to exercise these freedoms."). In a similar vein, the University's policy does not incorporate a right of free speech that is co-extensive with the First Amendment; rather, as quoted in the SCSH, the University's policy expressly limits free expression. R.16. No part of the SCSH promises unlimited free expression, let alone provides all the protections that would otherwise apply to governmental actors under the First Amendment to a private actor like the University.

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[5] *See* Petition, ¶ 19(1) (Hiroshima Political Comment – "Petitioner believes this allegation was based on a statement made by Petitioner that was taken out of context."); ¶ 19(2) (Second Class Citizens Comment – "Petitioner suspects that [a fellow student] made the allegation by extrapolating from a discussion they had about whether men's or women's snowboarding was better to watch."); ¶ 19(4) (Swastika – "Petitioner used a swastika as his game symbol because he had the lowest score in the game, and the swastika represented the fact that he was a 'loser' at quiplash."); ¶ 19(5) (Fire Alarm Joke – "This allegation was taken entirely out of context. . . . Petitioner made the statement in jest to express his frustration about being unable to sleep."); ¶ 19(6) (Black Girl Anthem – "Petitioner made what he thought was a joke to [a fellow student] . . . about the song. This student instead was offended by Petitioner's statement. This student told Petitioner that she was offended by the statement, and Petitioner promptly apologized for saying it."); ¶ 19(7) (Alleged Boyfriend Comment – "Petitioner told the woman's boyfriend, who had been working out and was wearing one of her shirts, that 'his boobs were bigger than his girlfriend's.").

In determining whether a university followed and fairly applied its policies and procedures, courts must defer to the institution's interpretation of those documents unless the institution's interpretations are "unreasonable []or irrational." *Hyman v. Cornell Univ.*, 82 A.D.3d 1309, 1310 (3d Dep't 2011); *see also Elderwood Health Care Ctr. at Linwood v. Novello*, 59 A.D.3d 932, 933 (4th Dep't 2009). Because the UCB found that Petitioner's statements (and other conduct) were in violation of the Code of Student Conduct, as detailed in the UCB's decision (R.1 – R.7), and its findings were plainly not unreasonable or irrational, the Court must defer to the UCB's assessment.

The UCB applied the plain language of the SCSH to the facts before it, finding Petitioner violated Sections 1, 2, 3, 9, and 15 of the Code of Student Conduct. (R.1 – R.7; Newcomb Aff., ¶¶ 10, 14, 15). More specifically, the UCB found that Petitioner's statements and other conduct threatened the mental health, physical heath, and safety of other students, constituted harassment beyond the bounds of protected speech and disruptive and obscene behavior, and created a hostile environment for students within the residence hall. R.4 – R.6. Petitioner contends that, in his interpretation, his conduct did not violate the Code of Student Conduct because it did not amount to "threats," "harassment," "bullying," "fighting words," or "disorderly conduct." Petitioner's Memorandum of Law, pp. 26-28. Thus, in essence, Petitioner is asking the Court to second guess the rational assessment of the evidence and the reasonable interpretation of the provisions of the Code of Student Conduct. The Code of Student Conduct is meant to be interpreted and defined by the UCB, within the context of the SCSH, not according to First Amendment jurisprudence, as Petitioner urges. The UCB's interpretation is consistent with the plain language of the Code of Student

Conduct and was neither irrational nor unreasonable. As such, the Court's review under Article 78 may proceed no further.

E. Petitioner was not entitled to the appearance or cross-examination of the students who made accusations against him.

Petitioner argues that "[n]o one who complained against Petitioner was present for examination concerning the truth of the allegations or the context in which they were made," and, therefore, he contends that his "basic right to confront and question the truth of allegations against him was denied." This argument has explicitly been rejected by the Fourth Department in a previous case against *Syracuse University*, particularly in the situation where, as here (*see* Petition, ¶ 23), a DPS officer filed the complaint and testified at the hearing:

> Here, respondent substantially adhered to the procedures outlined in its Judicial System Handbook. Pursuant to section two, part 3.1 of the Handbook, a complaint may be filed by any member of the University community, including a student, faculty member or staff member. The complaint against petitioner was filed by a sergeant in respondent's Department of Public Safety. As the complainant, the sergeant testified at the hearing held before respondent's Judicial Board and was cross-examined by petitioner. Petitioner therefore was afforded his right to "face the opposing party and to ask questions" pursuant to section two, part 7.3 of the Handbook, and there are no further relevant requirements in the Handbook. Thus, we reverse the judgment, deny the petition and reinstate the indefinite suspension.

Al-Khadra, 291 A.D.2d at 866.

Petitioner was not entitled to the appearance or cross-examination of the students who made the accusations against him, and more specifically, § 8.1 of the SCSH states, in pertinent part, as follows:

> The University Student Conduct System is not authorized to compel the appearance of any witness at a University Student Conduct System proceeding. Similarly, neither party nor their representatives are authorized to compel or attempt to compel the appearance of any person at a University Student Conduct System proceeding.

R.26 – R.27. Rather, in accordance with §§ 7.4, 7.10, 9.1, and 9.8 of the SCSH (R.25 – R.28), Petitioner was provided with an opportunity at the hearing to confront, and respond to, each and every allegation made against him, including the opportunity to ask questions of DPS indirectly through the UCB hearing panel. Newcomb Aff., ¶ 10. Indeed, Petitioner did ask questions of DPS through the UCB hearing panel, *see id.*, as evidenced by, for example, Petitioner's own admission in Paragraph 25 of the Petition.

F. The University was not required to transcribe or otherwise record the hearing.

Petitioner further contends that the University "failed in its duty to preserve a record of the hearing when it failed to either electronically or stenographically record the proceeding." Petition, ¶¶ 10, 39. The SCSH does not require the University to record the hearing, and in fact, the SCSH prohibits recording devices except in sexual assault cases, as required by law, or in hearings involving an associated felony arrest. R.26, R.30.

Petitioner's reliance on *Hill* is, again, unavailing, in light of the fact that the University is not subject to the same constitutional obligations as public universities. *See* Section 2, *supra.* Even the court in *Hill* did not hold that a public university was required to transcribe the hearing; rather, because the determination was not supported by substantial evidence, the court "decline[d] respondent's invitation to remit th[e] matter for a new hearing in light of its failure to transcribe the disciplinary hearing." 163 A.D.3d at 1455 (noting SUNY Buffalo's "procedural error in failing to transcribe the initial hearing") (emphasis added).

The University further submits that a recording or transcript of the disciplinary proceeding is not needed to determine whether the University substantially adhered to the SCSH so as to ascertain whether its actions were arbitrary and capricious. The record before the Court demonstrates that Petitioner has not alleged that any of the procedural protections he claims were

lacking are set forth in, or otherwise required by, the SCSH, and as such, the lack of a recording or transcript is not an impediment to judicial review.

G. The University was not required to allow legal representation during the hearing.

Petitioner argues, without citation to legal precedent, that "the denial of counsel in this case does not comport with due process requirements." However, as set forth more fully in Sections 1 and 2, *supra*, Petitioner, as a student at a private university, was not entitled to "due process." *See, e.g., Kickertz*, 25 N.Y.3d at 944 ("A student subject to disciplinary action at a private educational institution is not entitled to the 'full panoply of due process rights.' Such an institution need only ensure that its published rules are 'substantially observed.'") (internal citations omitted). Moreover, with the exception of perhaps the narrow circumstances presented in *Ryan*, *see* Section 1, *supra*, the University is unaware of any court decision holding that a private university is required to allow a student to be represented by an attorney in connection with a student disciplinary proceeding.

Petitioner further alleges that OSRR told him that "an attorney would not be allowed in the room." Petition, ¶ 21. Such an allegation is, again, not inconsistent with, or otherwise in violation of, the SCSH. *See* R.26 ("No attorney . . . will be permitted to participate in the conduct process on behalf of the complainant or respondent, except where criminal or civil proceedings are also pending.").

H. Petitioner was not denied a procedural advisor in violation of the SCSH.

Petitioner argues that the University's "failure to provide a procedural advisor on request . . . violated Petitioner's right to a fair hearing." Petitioner was informed on multiple occasions prior to the hearing of the process used to obtain a procedural advisor, as set forth in § 5.8 of the SCSH (R.24), and more specifically Petitioner was:

(i) informed that a procedural advisor could include any full-time student, staff, or faculty member at the University;

(ii) encouraged to seek procedural advice or other support from people outside of the University;

(iii) advised that the Office of Student Assistance ("OSA") maintains a pool of University community members that have volunteered and have been trained to provide procedural advice and support; and

(iv) informed that assignment of a procedural advisor from OSA is based on availability and is not guaranteed.

R.42 – R.43, R.46, R.49 – R.50; R.248 – R.250; Reese Aff., ¶¶ 3, 6. Though true that Petitioner was advised by OSA that a procedural advisor from OSA was not available for his scheduled hearing date, Petitioner was aware that any "assignment of a procedural advisor from OSA is based on availability and is not guaranteed," (R.42 – R.43, R.46, R.49 – R.50; R.248 – R.250), and he was further reminded by OSA on at least two occasions that any other student, staff, or faculty member at the University could serve as his procedural advisor (Reese Aff., ¶¶ 3, 6).

Petitioner did not request to adjourn the hearing until such time as a procedural advisor from OSA could be made available, nor did he otherwise request additional time to obtain a procedural advisor (Newcomb Aff., ¶ 11; Peter Aff., ¶ 24), which, again, could be any full-time student, staff, or faculty member of the University (R.42 – R.43, R.46, R.49 – R.50; R.248 – R.250; Reese Aff., ¶¶ 3, 6). Petitioner also had ample opportunity between February 9, 2018 and March 27, 2018 to not only familiarize himself with the SCSH, but also to seek pre-hearing counsel from OSA (Reese Aff., ¶¶ 3, 6, 9); OSRR (R.42 – R.43, R.49 – R.50), the Student Conduct Case Manager (R.42 – R.43, R.49 – R.50), any student, staff, or faculty member of the University (R.42 – R.43, R.49 – R.50; Reese Aff., ¶¶ 3, 6), his family and friends, and if so

inclined, an attorney. Indeed, the record reflects that Petitioner did seek pre-hearing counsel from OSA (Reese Aff., ¶¶ 3, 6, 9).

I. Petitioner's prior disciplinary record was only considered by the UCB in connection with its determination on sanctions.

Petitioner contends that any discussion or consideration during the hearing of a race-related statement admittedly made by Petitioner in October 2017, but not included in the written notice of charges, was improper and prejudicial. In support of his position, Petitioner relies, again, solely on case law involving governmental entities, rather than private institutions, all of which is inapplicable here. *See* Section 2, *supra.*

Back in October 2017, ORL received a complaint against Petitioner alleging that, on or about October 7, 2017, Petitioner told another student, whose perceived racial identity is black, "to go back to the plantation." R.79 – R.80; Peter Aff., ¶ 4. ORL subsequently sent a letter advising Petitioner that a complaint had been filed against him alleging that he violated the Code of Student Conduct and/or ORL Residential Policies in connection with the October 7, 2017 incident. R.83 – R.84; Peter Aff., ¶ 5. Thereafter, during an informal resolution meeting with ORL, Petitioner accepted responsibility and sanctions for violating the following section of the Code of Student Conduct:

> Harassment—whether physical, verbal or electronic, oral, written or video—which is beyond the bounds of protected speech, directed at a specific individual(s), easily construed as "fighting words," or likely to cause an immediate breach of the peace.

R.85 – R.86; Peter Aff., ¶ 6. As a result, ORL sent a letter to Petitioner, which confirmed the outcome reached at the informal resolution meeting and the agreed-upon sanctions, placing Petitioner on a status of disciplinary reprimand through October 7, 2018; required that he watch an anti-bias documentary; and required that he write a two-page research paper, referred to as a "documentary reflection," following his viewing of the anti-bias documentary. R-91 – R.92;

Peter Aff., ¶ 7. Petitioner subsequently watched the anti-bias documentary, entitled *13th: From Slave to Criminal with One Amendment*, wrote the documentary reflection, and remained on disciplinary reprimand through October 7, 2018. R.93 – R.99; Peter Aff., ¶ 8.

Although the October 2017 incident was referenced during the UCB hearing on March 27, 2018, the UCB's decision reflects that the UCB did not consider that incident in making its factual findings, specifically noting that it was not considered relevant because the "incident was already reviewed and disciplinary action was taken." R.1 – R.7; Newcomb Aff., ¶ 13. However, after the UCB had made its finding of responsibility and prior to sanctioning, it considered the outcome of that October 2017 incident, as well as the outcome of another prior conduct case against Petitioner from November 2017, in accordance with the SCSH, which allows the UCB to consider a student's prior disciplinary record when determining the appropriate level of discipline. R.31 – R.32; Newcomb Aff., ¶ 16.

IV. THE PROPER STANDARD OF REVIEW IS ARBITRARY OR CAPRICIOUS; THE UNIVERSITY'S DECISION WAS NOT ARBITRARY OR CAPRICIOUS; THE SANCTIONS IMPOSED WERE APPROPRIATE; AND THE COURT HAS JURISDICTION TO ADJUDICATE THIS MATTER.

A. The proper standard of review is arbitrary and capricious.

It is well-settled that the standard of judicial review of disciplinary matters between a private college and its students, where a hearing is not required by law, is whether the determination is arbitrary or capricious, not whether it is supported by substantial evidence. *See Basile v. Albany Coll. of Pharm.*, 279 A.D.2d 770, 771 (3d Dep't 2001); *Rensselaer Soc'y of Eng'rs*, 260 A.D.2d at 993; *Cornell Univ.*, 59 Misc. 3d at 924-25 (citing cases). Only where a hearing is required "pursuant to a direction by law" must the determination be supported by substantial evidence. *Compare* CPLR § 7803(3) with CPLR § 7803(4).

The hearing required and provided in Petitioner's disciplinary proceeding was not "pursuant to a direction by law," but rather pursuant to the SCSH, and therefore, the substantial evidence standard does not apply. *See Cornell Univ.*, 59 Misc. 3d at 924-25 ("This court concludes that Cornell's voluntary grant of a hearing does not transform this into a hearing pursuant to law. Thus, the substantial evidence standard does not apply. . . ."); *see also Rensselaer Soc'y of Eng'rs*, 260 A.D.2d at 993 ("Supreme Court improperly concluded that the petition raised a question of substantial evidence mandating transfer to this Court pursuant to CPLR 7804(g). As the hearing held by the Greek Judicial board was not required by law, the standard of review is whether the challenged determination is arbitrary or capricious.").

B. The University's decision was not arbitrary or capricious.

The University's "determination to suspend [P]etitioner was rendered in accordance with the [SCSH] and based upon the exercise of honest discretion after a full review of the operative facts," and, therefore, "neither arbitrary nor capricious so as to warrant judicial intervention." *Galiani*, 118 A.D.2d at 572. The UCB made the following determinations regarding Petitioner's responsibility for the Code of Student Conduct violations:

> CSC 1 – The [UCB] found [Petitioner] responsible for violating CSC 1 because [Petitioner] contributed to the bullying culture (putting trash cans in front of doors and putting apples on a students [sic] door) on the floor which threatened the physical safety of students living in the hall. [Petitioner] also knocked on doors of students after his first incident to find out who reported him for his comments, which the [UCB] considered intimidating and threatening to the students involved.
>
> CSC 2 – The [UCB] found the [Petitioner] responsible for violating CSC 2 because his actions and language were considered harassing to members of the floor community. [Petitioner] made bias-related comments about specific student's race, religion, and gender, over a period of several weeks, and possibly months. Specifically he drew swastikas during a game played in the common area of his floor, he

> placed trash cans outside of people's doors, and he made comments including "your boyfriend's tits are bigger than yours" to a female student, and "really, the black girl anthem" to a group of black women on the floor.
>
> CSC 3 – The [UCB] found [Petitioner] responsible for violating CSC 3 because his actions threaten the physical and mental health of the students in his residence hall. [Petitioner] partook in bullying others by placing trash cans outside of doors and was aware that a fellow floor mate was putting apples on a student's door. His actions caused his floor mates to be fearful to report behavior to the Resident Director. These actions continued throughout the semester and the [UCB] believes this is a pattern of behavior.
>
> CSC 9 – The [UCB] found [Petitioner] responsible for violating CSC 9 because [Petitioner] demonstrated disruptive and obscene behavior throughout the course of the fall semester. [Petitioner] used offensive language in the public lounge, and made obscene comments to at least one female, specifically that "your boyfriend's tits are bigger than yours."
>
> CSC 15: 4i – The [UCB] found [Petitioner] responsible for violating CSC 15 because [Petitioner] aided in creating a hostile environment within his residence hall. The students within [Petitioner's] residence hall have the right to feel safe and be free from all forms of discrimination. [Petitioner's] behavior threatened the safety of the community and was discriminating towards multiple individuals and groups in the community.

R.1 – R.7. "A court may not substitute its judgment for the judgment and discretion properly exercised by college administrators." *Dalmolen*, 279 A.D.2d at 932 (citing cases); *see also* Section 3, *supra*.

C. The sanctions imposed were appropriate.

A court may not disturb a university's imposed punishment unless it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1*, 34 N.Y.2d 222, 230 (1974).

A sanction up to and including expulsion is appropriate when a student repeatedly violates a university's proscribed standards of conduct. *See Ebert*, 28 A.D.3d at 316; *Idahosa v. Farmingdale State Coll.*, 97 A.D.3d 580, 581 (2d Dep't 2012).

The University submits that the one-year suspension and other sanctions imposed on Petitioner in this case were appropriate in light of the nature and scope of his conduct, his prior disciplinary record, and the fact that he was on disciplinary probation at the time of the hearing. R.31 – R.32 (noting that when on disciplinary probation, "further violations may result in immediate suspension, indefinite suspension, or expulsion"); Peter Aff., ¶¶ 11-12; *see Ebert*, 28 A.D.3d at 316 ("Given petitioner's disciplinary history, including that he was on probation at the time of the offense, the penalty imposed is not shocking to our sense of fairness").

D. The Court has jurisdiction to adjudicate this matter.

Contrary to Petitioner's contention, this Court does, in fact, have jurisdiction to adjudicate this matter. *See, e.g., Cornell Univ.*, 59 Misc. 3d at 924-25 ("This court concludes that Cornell's voluntary grant of a hearing does not transform this into a hearing pursuant to law. Thus, the substantial evidence standard does not apply, and therefore, the matter should not be transferred to the Appellate Division under CPLR 7803(4) and CPLR 7804(g).").

V. PETITIONER IS NOT ENTITLED TO THE REQUESTED RELIEF.

In Article 78 proceedings, "[t]he judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew." CPLR § 7806. If Petitioner prevails in this proceeding, he is entitled to another disciplinary hearing before the UCB, curing any procedural deficiencies the Court might find in the original hearing process. *See Jacobson v. Blaise*, 157 A.D.3d 1072, 1080 (3d Dep't 2018) (finding that "remittal for a new hearing is the appropriate remedy" in Article 78 action challenging a university's disciplinary process); *Skorin-Kapov v. State Univ. of N.Y. at Stony Brook*, 281 A.D.2d 632, 633

(2d Dep't 2001) (finding appropriate remedy in Article 78 proceeding challenging a university's denial of a tenure application was to remit the matter for further review of the tenure application); *Libra v. Univ. of State of N.Y.*, 124 A.D.2d 939, 940 (3d Dep't 1986) (remitting matter to university for further proceedings); *Gupta v. Boyer*, 55 A.D.2d 1024, 1025 (4th Dep't 1977) ("[I]f it is found that petitioner should have been presented with charges of professional misconduct, and that he should have been afforded a hearing as a condition precedent to the nonrenewal of his term appointment, the trial court should, at that point, remit the matter for resolution to respondent-appellant college for proceedings consistent with the governing labor agreement"). If Petitioner prevails he is not entitled to any other relief, including, but not limited to, the injunctions and other relief requested in the Petition.

CONCLUSION

Based upon the allegations in the Petition and the uncontroverted evidence in the record, it was rational for the UCB to conclude that the Petitioner did the actions that were complained of; Petitioner admits the bad conduct but seeks redress for the lack of constitutional protections to which he was not entitled. Petitioner implores this Court to disregard the fact that he was enrolled at a private university, and he urges the court to impose upon Syracuse University the protections that the law imposes only upon public institutions. In doing so, Petitioner asks this court to go far beyond well settled and longstanding legal precedent in his search for a remedy as he urges the Court to hold this private institution to the legal standards which are set forth to protect citizens from the actions of government actors. This is a bridge too far to cross. While Petitioner clearly wants this Court to abandon the distinction between the protections to be afforded to students in public versus private universities, the legal precedent makes plain that there is a very strong legal justification for the distinction. State actors are held to different legal standards and no matter the inclination or even perhaps the desirability to conflate the two, the

law plainly forbids it. For the foregoing reasons, the Court should dismiss the Petition in its entirety and grant the University costs and such other and further relief as the Court deems just and proper.

DATED: March 1, 2019

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