

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of,

AUSTIN TONG,

Petitioner,

-against-

FORDHAM UNIVERSITY, JOSEPH M. MCSHANE,
in his capacity as President of FORDHAM UNIVERSITY,
and KEITH ELDREDGE, in his capacity as Assistant Vice
President and Dean of Students of FORDHAM
UNIVERSITY,

Respondent,

For a Judgment Pursuant to Article 78 and Section 3001
of the Civil Practice Law and Rules.

Index No. 155646/2020

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'
MOTION TO DISMISS PETITIONER'S VERIFIED PETITION
AND IN OPPOSITION TO PETITIONER'S REQUEST
FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Respondents Fordham University (“Fordham” or the “University”), Joseph M. McShane (“Father McShane”), and Keith Eldredge (“Dean Eldredge”) (collectively “Respondents”) respectfully submit this Memorandum of Law, the accompanying affidavit of Keith Eldredge, sworn to on August 13, 2020 (the “Eldredge Affidavit”), and the affirmation of James G. Ryan, dated August 14, 2020 (the “Ryan Affirmation”, in support of Respondents’ motion to dismiss the verified petition (the “Petition”) and in opposition to Petitioner Austin Tong’s (“Petitioner”) motion brought by order to show cause seeking a preliminary injunction.

Despite the attendant media frenzy that has spun this matter into a Second Amendment rights case, this matter actually and simply concerns disciplinary sanctions issued to Petitioner following a disciplinary hearing related to University Code of Conduct violations. In sum, Petitioner posted a picture of himself posing with his recently purchased semi-automatic AR-15 rifle along with the caption “Don’t tread on me” in response to third party social media posts which condemned his previous posts critical of the Black Lives Matter movement. Specifically, Petitioner was found to have violated the University Code of Conduct articles, University Regulations and/or Office of Residential Life policies (the “University Code of Conduct”) related to bias and/or hate crimes as well as threats/intimidations as a result of posts he made on Instagram. Following Fordham’s determination that Petitioner was in violation of the University Code of Conduct, the University, through its Dean of Students, Keith Eldredge, issued very limited and balanced sanctions to Petitioner that placed him on disciplinary probation, directed him to move to an online learning modality, and restricted his physical access to Fordham’s campus to an express permission only basis. He was also required to take an anti-bias training course, write a letter of apology and his parents were notified of the sanctions.

In ignoring that the safety of the campus community was the driver behind the decision, Petitioner argues in his Petition and motion papers that Fordham, through its Mission Statement, granted him free speech rights equivalent to those rights protected under the First Amendment of the United States Constitution. In doing so, Petitioner ignores the obvious limitations that Fordham, as a private institution, can place on students' right to free expression in an effort to protect other students from harassment, threats, and intimidation. Petitioner also entirely ignores Fordham's commitment to protecting students' personal safety and the potential threats to student safety that his Instagram posts presented.

As will be explained in detail below, there is no question that Fordham followed its policies and procedures, acted in honest discretion and was neither arbitrary nor capricious in its determination that Petitioner violated the University Code of Conduct. Moreover, the imposition of disciplinary sanctions against him that allow him to complete his education, certainly does not shock one's sense of fairness. Consequently, the University moves to dismiss the Petition, pursuant to CPLR § 7804(f), for failure to state a cause of action pursuant to CPLR § 3211(a)(7) and a defense founded upon documentary evidence pursuant to CPLR § 3211(a)(1). Additionally, Respondent Reverend Joseph M. McShane S.J., the President of Fordham, is not alleged to have had any involvement in the decision at issue and therefore should be dismissed as a party hereto. Finally, this memorandum of law, along with the supporting papers to Respondents' motion to dismiss, are also submitted in opposition to Petitioner's motion, brought by order to show cause, for a preliminary injunction.

As more fully set forth herein, Petitioner's claims must fail and therefore, his Petition should be dismissed in its entirety.

STATEMENT OF FACTS

For the Court's convenience, the University briefly summarizes the relevant facts and timeline set forth in the Eldredge Affidavit.

Fordham's Policies and Procedures

Fordham's Student Handbook contains the University's Regulations which include the University Code of Conduct and its policies and procedures related to student discipline. The University Code of Conduct prohibits students from engaging in certain conduct such as "[p]hysical abuse, sexual abuse, threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person" and "[e]ngaging in lewd, licentious, or disorderly conduct." See Eldredge Affidavit at ¶¶ 9-10. Fordham's Student Handbook also contains a policy related to Bias-Related Incidents and/or Hate Crimes. See id. at ¶ 12. Fordham also makes a commitment to protect the personal safety of all Fordham students. On its website, Fordham states that students' personal safety is "most important." See id. at ¶ 15.

Petitioner's Social Media Posts

On June 4, 2020, Fordham received multiple complaints from concerned students regarding recent social media posts made by Petitioner. See id. at ¶ 20. Specifically, on June 3, 2020, Petitioner posted an image on his Instagram account of retired police officer, Captain David Dorn, who had been murdered while protecting a friend's pawn shop from looters in St. Louis. Petitioner included the caption "Y'all a bunch of hypocrites" with the picture of Captain Dorn. See id. at ¶ 21. Petitioner thereafter received a backlash from many of his social media followers who viewed the post as seeking to diminish the Black Lives Matter movement and as an attempt to incite negative reactions from Black Lives Matter supporters. See id. at ¶ 22.

The following day, June 4, 2020, Petitioner posted another image on his Instagram account of himself holding what appeared to be a semi-automatic rifle along with the caption “Don’t tread on me. #198964.” See id. at ¶ 24. Petitioner later admitted he had just purchased the AR-15 rifle that same day and referred to it as an AR-15. See id. at ¶ 25. In response to the overwhelmingly negative and concerned reaction Petitioner received concerning his June 4, 2020 post of himself posing with the rifle, he subsequently added an additional comment beneath his post, which is not readily visible without taking additional steps to view all the comments on his post, to claim that his post was now actually only related to the anniversary of the Tiananmen Square massacre and not to the Black Lives Matter movement. See id. at ¶ 26.

Many members of the Fordham community did not believe him and expressed significant concern and fear about Petitioner’s June 4, 2020 post given its temporal proximity to his June 3, 2020 post concerning Captain David Dorn and the Black Lives Matter movement. See id. at ¶ 27. One student described Petitioner’s posts as “extremely alarming” and stated that she “found this post threatening- not simply due to the firearm but also because the day before, Austin posted an image of David Dorn, a cop who was killed by looters, with the caption ‘y’all are a bunch of hypocrites.’” See id. ¶ 28. Another student stated that Petitioner’s posts were “grotesque” and “racist” and that she was “frightened” by them. See id. at ¶ 29.

In response to the multiple student complaints related to Petitioner’s social media posts, two members of Fordham’s Public Safety Office were dispatched to Petitioner’s home, with his consent, that same day to discuss the Instagram posts with Petitioner and assess whether Petitioner presented danger to himself and others. See id. at ¶ 30. During this conversation, Petitioner stated that he legally purchased what he described as an AR-15 rifle that he is seen holding in his Instagram post earlier that day to protect himself and his family during the then

current Black Lives Matter protests. See id. at ¶ 32. Petitioner further confirmed his reason for purchasing the AR-15 rifle in a written statement he provided to Fordham's Public Safety Officers on the night of June 4, 2020. See id. at ¶ 35.

Due to the serious nature of Petitioner's Instagram posts, the security threat they presented, Petitioner's admission during his discussion with Fordham's Public Safety Officers, and the expressed concern and fear from members of the Fordham community, Fordham's Assistant Vice President and Dean of Students, Keith Eldredge, decided that the situation warranted further investigation and a formal hearing. In accordance with the University Code of Conduct, Dean Eldredge sent a letter to Petitioner dated June 8, 2020 informing him that he may have violated the University Code of Conduct. See id. at ¶ 39.

Petitioner's Hearing and Disciplinary Decision

A virtual hearing was conducted on June 10, 2020 at which Dean Eldredge served as the hearing officer. See id. at ¶ 40. The hearing lasted approximately 45 minutes, during which time Petitioner made a statement regarding his actions and answered a number of questions from Dean Eldredge. See id. at ¶ 41. During the hearing, Petitioner stated that he was not sure if he had ever posted about Tiananmen Square before his June 4, 2020 post. See id. at ¶ 43. Petitioner also again admitted that he purchased his AR-15 rifle because of the Black Lives Matter Movement and not to commemorate the Tiananmen Square massacre. See id. at ¶ 44.

Following the hearing, Dean Eldredge took time to carefully consider Petitioner's statements, actions, and their timing as well as the concerns and fears raised by other members of the Fordham community. See id. at ¶ 46. Dean Eldredge also conducted independent research into the issues depicted in Petitioner's social media posts and their possible interpretations. See id. at ¶¶ 48-50. Ultimately, Dean Eldredge determined that Petitioner violated the University

Code of Conduct related to Bias and/or Hate Crimes and Threats/Intimidation. See id. at ¶ 52. Dean Eldredge informed Petitioner of his decision in a letter dated July 14, 2020. See id. at ¶¶ 52-53. He also informed Petitioner that Petitioner had been placed on disciplinary probation, that his access to campus was restricted to a permission only basis and that Petitioner must complete his course work via online instruction. See id. Finally, Petitioner was directed to take an implicit bias training course, write a letter of apology, and was also notified that his parents would be informed of Dean Eldredge's decision. See id.

As seen in his affidavit, Dean Eldredge arrived at this decision based on a number of factors, by far the most paramount of which was and is the safety of everyone in the Fordham community. Simply put, while Petitioner asserts that his June 4, 2020 Instagram post which depicted Petitioner holding an AR-15 rifle with the caption "Don't tread on me" was solely in reference to the anniversary of the Tiananmen Square incident, it is impossible to ignore the temporal implications of making such a post mere hours after making a post related to the Black Lives Matter movement and ongoing protests to which Petitioner received significant negative backlash. See id. at ¶ 54. A number of members of the Fordham community felt the same way and reached out with concerns and fear regarding the temporal proximity of the two posts and believed that Petitioner's June 4, 2020 post was in actuality a veiled attempt to intimidate those who disagreed with his June 3, 2020 comments concerning Captain Dorn and the Black Lives Matter movement. See id. at ¶ 55. Dean Eldredge also chose to issue the specific disciplinary sanctions mentioned above in an effort to achieve balance between ensuring the safety of those in Fordham community with the minimal impact the sanctions would have on Petitioner's academic progression. See id. at ¶¶ 59-61.

The Instant Proceeding

Petitioner filed this Article 78 proceeding on July 23, 2020. See Ryan Affirmation at ¶ 3. Petitioner simultaneously filed an order to show cause seeking a temporary restraining order and preliminary injunction to enjoin the University from enforcing its disciplinary sanctions against Petitioner until the resolution of this action. See id. at ¶ 4. The parties resolved Petitioner's request for a temporary restraining order through a stipulation filed on July 31, 2020 and so ordered by this Court on August 6, 2020. See id. at ¶ 5. In the stipulation, the parties agreed to stay and/or hold in abeyance any disciplinary sanctions or requirements as listed in items 3 and 4 of the letter dated July 14, 2020 from Dean Eldredge to Tong. Items 3 and 4 describe the implicit bias training and submission of a letter of apology. That stipulation also set forth the briefing schedule for this motion. See id. Fordham now moves to dismiss the Petition pursuant to CPLR § 7804(f), for failure to state a cause of action pursuant to CPLR § 3211(a)(7) and a defense founded upon documentary evidence pursuant to CPLR § 3211(a)(1). Fordham also moves to have the Petition dismissed against Father McShane, due to the fact that he was in no way involved in the decision-making process and is not alleged in the Petition to have been involved. Finally, Respondents also submit this memorandum of law in opposition to Petitioner's motion, brought by order to show cause, seeking a preliminary injunction.

STANDARD AND METHOD OF REVIEW

Generally, "claims based upon the rights or procedures found in college manuals, bylaws and handbooks may only be reviewed by way of a special proceeding under Article 78 of New York's CPLR in New York State Supreme Court." Bickerstaff v. Vassar College, 354 F.Supp.2d 276, 283 (S.D.N.Y. 2004), aff'd, 160 Fed. Appx. 61 (2d Cir. 2005) (summary order); see Byerly

v. Ithaca College, 290 F.Supp.2d 301, 305 (N.D.N.Y. 2003) (asserting review of controversies involving colleges and universities give way to an Article 78 proceeding, not a plenary action) (citing Maas v. Cornell Univ., 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 718-19 (1999)). Article 78 review is the appropriate procedure to seek review of whether an academic institution abided by its own rules. See Melvin v. Union Coll., 195 A.D.2d 447, 447-78, 600 N.Y.S.2d 447 (2d Dept. 1993) (wherein a student challenged whether a university abided by the rules set forth in its student handbook in regards to a disciplinary determination); Jennings v. Teachers Coll., 29 Misc. 3d 1236(A), 920 N.Y.S.2d 241 (Sup. Ct., N.Y. Cnty. 2010) (citing Silverman v. New York Univ. Sch. of Law, 193 A.D.2d 411, 597 N.Y.S.2d 314 (1st Dept. 1993) (for the proposition that student's breach of contract claim based on alleged violations of student handbook was only judicially addressable via an Article 78 proceeding)).

Under CPLR § 3211(a)(7), “[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that...the pleading fails to state a cause of action.” This Court is “not required to accept factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts.” Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495, 495, 815 N.Y.S.2d 547 (1st Dept. 2006); see, e.g., Sempra Energy Trading Corp. v. BP Prods., 52 A.D.3d 350, 860 N.Y.S.2d 71 (1st Dept. 2008) (dismissing claim where it was refuted by documentary evidence). This is true even in the context of a motion to dismiss. Normally courts accord plaintiffs (or petitioners) every favorable inference for the purpose of determining motions to dismiss. See, e.g., Maas v. Cornell Univ., 699 N.Y.S.2d 716, 718 (1999). However, neither allegations consisting of bare legal conclusions nor factual claims flatly contradicted by documentary evidence, are entitled to “that arguendo advantage.” Id.

As set forth fully below, the documentary evidence establishes that the University fully complied with its policies and procedures related to both the imposition of and the extent of the sanctions issued against Petitioner.

ARGUMENT

POINT I

THE UNIVERSITY COMPLIED WITH ITS POLICIES AND PROCEDURES

Despite Petitioner's attempts to distract from the real issue in this matter by continuously referencing his constitutional rights, Petitioner's claims actually turn on whether Fordham followed its policies and procedures in choosing to impose disciplinary sanctions upon Petitioner and whether Fordham's decision was arbitrary or capricious. The answer to the first inquiry is yes, Fordham followed its policies and procedures and the answer to the second question is no, because Fordham's decision was based entirely on the facts and circumstances presented. Simply put, Fordham's decision to impose disciplinary sanctions on Petitioner in response to his actions and in an effort to maintain the safety of all those in the Fordham campus community was made in accordance with Fordham's policies and procedures and was made after careful consideration of all the facts.

It is well settled in New York that courts have a "restricted role" in reviewing determinations of colleges and universities. Aryeh v. St. John's University, 154 A.D.3d 747, 63 N.Y.S.3d 393 (2d Dept. 2017). The standard of judicial review of an academic institution's purely disciplinary determinations is limited to whether: (i) the institution "substantially adhered to its own published rules and guidelines"; and (ii) the determinations are based on "a rational interpretation of the relevant evidence" such that they are neither arbitrary nor capricious. See Ibe v. Pratt Inst., 151 A.D.3d 725, 726, 53 N.Y.S.3d 558, 559 (2d Dept. 2017); VanHouten v.

Mount St. Mary's Coll., 137 A.D.3d 1293, 1295, 28 N.Y.S.3d 433 (2d Dept. 2016); Katz v. New York Univ., 95 A.D.3d 547, 548, 943 N.Y.S.2d 518 (1st Dept. 2012).

Students subject to disciplinary proceedings at a private university are not entitled to the “full panoply of due process rights.” Ebert v. Yeshiva Univ., 28 A.D.3d 315, 315, 813 N.Y.S.2d 408, 409 (1st Dept. 2006). “Such an institution need only ensure that its published rules are ‘substantially observed.’” Aryeh v. St. John's Univ., 154 A.D.3d 747, 748, 63 N.Y.S.3d 393, 395 (2d Dept. 2017). “A determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness.” Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216, 32 N.E.3d 371, 375 (2015); see also Aryeh v. St. John's Univ., 154 A.D.3d 747, 748, 63 N.Y.S.3d 393, 395 (2d Dept. 2017).

Moreover, it is well settled that a college or university has the authority to adopt resolutions and enforce policies as it deems necessary to ensure the safety and supervision of its campus community as a whole. VanHouten v. Mount St. Mary Coll., 137 A.D.3d 1293, 1294, 28 N.Y.S.3d 433, 435 (2d Dept. 2016) (upholding college's decision to expel student due to disruptive classroom behavior); see also Ibe v. Pratt Inst., 151 A.D.3d 725, 726, 53 N.Y.S.3d 558, 559 (2d Dept. 2017) (affirming decision to expel student after student was found to have sexually harassed other students); Delta Kappa Epsilon Alumni Corp. v. Colgate University, 11 Misc.3d 1060(A), 816 N.Y.S.2d 694 (Sup. Ct., Madison Cnty. 2006). Courts in other jurisdictions have also supported this maxim and have found that the authority to adopt and enforce these policies is part of higher education institutions' duty “to use reasonable measures to protect students from foreseeable injury.” Regents of Univ. of California v. Superior Court, 4 Cal. 5th 607, 624, 413 P.3d 656, 667 (2018) (citation omitted); see also Dzung Duy Nguyen v.

Massachusetts Inst. of Tech., 479 Mass. 436, 453, 96 N.E.3d 128, 142 (2018) (holding that colleges and universities' duty to protect students from harm even extends to protecting students from committing self-harm).

Here, the decision to impose disciplinary sanctions on Petitioner was made by Dean Eldredge, a senior, experienced professional, who has held his current position for over 20 years and has been part of Fordham's Administration for over 20 years. As explained in detail below, Dean Eldredge arrived at this decision after a thorough investigation and a hearing in accordance with Fordham's policies and procedures. In making his decision, Dean Eldredge considered multiple sources of information including Petitioner's statements and admissions at his hearing, his social media postings and accompanying pictures, his purchase of a semi-automatic weapon immediately after receiving harsh criticism of his views, his multiple written statements, the various complaints from members of the Fordham community expressing concern and fear, and Dean Eldredge's own independent research. See Eldredge Affidavit at ¶¶ 46-61. Consequently, based on his thorough review of the evidence before him, Dean Eldredge made the reasoned decision to find Petitioner in violation of the University Code of Conduct articles, University Regulations and/or Office of Residential Life policies and impose limited sanctions on him that would maintain campus security while not interrupting Petitioner's academic pursuits. See id. at ¶ 53. Importantly, as seen in his affidavit, Dean Eldredge also considered the various opposing viewpoints regarding Petitioner's social media posts and the possible interpretations that could be drawn from them but found that Petitioner's explanation was not completely credible. See id. at ¶¶ 46-61. This decision also involved weeks of research, review and deliberation. See id.

In cases, such as here, that are unrelated to academic achievement, the New York Court of Appeals clearly defined the standard of review as: "whether the institution has acted in good

faith or its action was arbitrary or irrational.” Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 658, 427 N.Y.S.2d 760 (1980). “It is well established that judicial review of an educational institution's disciplinary determination involving nonacademic matters is limited to whether the institution substantially adhered to its own published rules and guidelines and was not arbitrary and capricious. Quercia v. New York Univ., 41 A.D.3d 295, 296, 838 N.Y.S.2d 538, 540 (1st Dept. 2007); see also Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Institute, 260 A.D.2d 992, 993, 689 N.Y.S.2d 292 (3d Dept. 1999); Ebert v. Yeshiva Univ., 28 A.D.3d 315, 813 N.Y.S.2d 408 (1st Dept. 2006) (citing Al-Khadra, 291 A.D.2d 865). The Court's inquiry is limited to whether the university substantially complied with its own guidelines or procedures. See Mu Chapter of Delta Kappa Epsilon, by Swett v. Colgate University, 176 A.D.2d 11, 578 N.Y.S.2d 713 (3d Dept. 1992).

As set forth by the Court of Appeals in Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216, 10 N.Y.S.3d 156 (2015), “[a] determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules (Matter of Harris v. Trustees of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959, 479 N.Y.S.2d 216, [1984], rev'g for reasons stated in dissenting op. of Kassal, J., 98 A.D.2d 58, 67–73, 470 N.Y.S.2d 368 [1983]) or imposes a penalty so excessive that it shocks one's sense of fairness (Galiani v. Hofstra Univ., 118 A.D.2d 572, 499 N.Y.S.2d 182, 182 (2d Dept. 1986)).” Consequently, in the absence of an affirmative showing that a university did not act in accordance with its own policies or procedures, there can be no finding that the decision at issue was arbitrary or capricious, or otherwise improper.

Thus, in order to prevail in this Article 78 proceeding, Petitioner must demonstrate that with respect to the actions taken against him, the University did not substantially observe its own

procedures or act in good faith. As demonstrated herein, Petitioner has not met and cannot meet this burden as a matter of law.

At the outset, it must be emphasized that Petitioner does not claim that Fordham failed to follow any procedural aspects of its disciplinary procedures. As stated in the Eldredge Affidavit, Petitioner was afforded all of the procedural rights provided to students that have been charged with violating the University's Code of Conduct. See Eldredge Affidavit at ¶¶ 39-45. Petitioner was notified of his alleged violations via a letter dated June 8, 2020. See id. at ¶ 39. Petitioner was given the opportunity to present his full version of the facts at a hearing with the Dean of Students. See id. at ¶¶ 40-45. Further, Petitioner was not subjected to any disciplinary sanctions prior to his hearing. Finally, in accordance with Fordham's policies and procedures, after the hearing, the Dean of Students considered all of the facts and evidence presented to him and made the decision to issue disciplinary sanctions against Petitioner. See id. at ¶ 53. Those sanctions were targeted, balanced, and limited in the sense that Petitioner may continue his academic pursuits and is constrained only in that his access to the campus must be with advance notice to, and with the permission of, Dean Eldredge. As such, there can be no dispute that Fordham followed all aspects of its disciplinary policies and procedures in deciding to impose disciplinary sanctions on Petitioner.

In face of his burden to demonstrate that Fordham did not substantially comply with its own procedures, Petitioner claims that Fordham cannot impose disciplinary sanctions on him as a result of his Instagram posts due to his right to free expression. In sum, Petitioner contends he should have been protected under Fordham's Mission Statement and a provision of the University Code of Conduct which both effectively state that students have a right to free expression. Petitioner's claims in this regard are entirely meritless.

Initially, Petitioner deliberately ignores Fordham's prerogative to limit a student's free expression rights which is outlined in the University Code of Conduct. See Petition at ¶¶ 42-48. Specifically, the University Code of Conduct prohibits students from engaging in "[p]hysical abuse, sexual abuse, threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person" under Section "6." See Eldredge Affidavit at ¶ 9. While Petitioner does cite to this section, he does so only to mention that firearms are not specifically mentioned and does not acknowledge the obvious limitations this section places on students' right to free expression. See Petition at ¶¶ 52-53. Such a statement makes little logical sense as semi-automatic firearms are generally considered to be weapons that can be used to "endanger the health or safety of any person." Petitioner also fails to acknowledge that students are also subject to discipline for "[e]ngaging in lewd, licentious, or disorderly conduct" under Section "11" of the University Code of Conduct. See Eldredge Affidavit at ¶ 10.

Moreover, Petitioner has completely failed to identify any part of Fordham's policies and procedures that the University failed to follow. As outlined in the University's June 8, 2020 and July 14, 2020 letters to Petitioner, the University found Petitioner to be in violation of the provisions of the University Code of Conduct that prevent students from harassing and threatening others. See Eldredge Affidavit at ¶¶ 39, 53. These provisions of Fordham's policies represent clear and permissible limitations on students' rights to freely express themselves. Fordham policies are designed to maintain an academic environment that supports students' right to free expression but done so in a way that does not allow students to harass and threaten others that they may disagree with.

Recently, the Supreme Court in Onondaga County had occasion to address a very similar case. In that case, a student was challenging Syracuse University's decision to expel him after he

made a post on his Facebook account that was viewed as making threats to minorities and liberals generally. The student argued that the university's sanction was disproportionate to his actions and that his post should have been protected under the university's code of conduct which stated that students have "the right to express themselves freely." Bilicki v. Syracuse Univ., 67 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2019). However, the court held that the code of conduct's reference to students' rights to free expression must be balanced with the other limitations expressed by the policy which included prohibition against statements that were harassing or threatening. See id. The court specifically noted that while the policy contained language regarding free expression it did "not give the students a blanket right to say or post anything that they wish." Id. Further, after determining that Syracuse University followed its published disciplinary procedures, the court upheld the university's decision to expel the student noting that even though the sanction "may be viewed as debatable" it was not shocking to the conscience. Id.

Just as the petitioner in Bilicki, when Petitioner chose to attend Fordham he chose to accept that while the University protects and values students' right to free expression, this right is not without limitation. Fordham clearly followed its policies and procedures by investigating and holding a hearing concerning Petitioner's potential violation of the provisions of the University Code of Conduct that prohibit students from harassing and threatening others. As such, Petitioner's claim that Fordham failed to follow its own policies and procedures must fail.

POINT II

THE UNIVERSITY'S DECISION WAS REASONABLE, MADE IN GOOD FAITH AND WAS NEITHER ARBITRARY NOR CAPRICIOUS

Because Fordham has demonstrated that the University followed its established policies and practices in deciding to impose disciplinary sanctions on Petitioner, the remaining question

for the Court is whether the decision was made in good faith or whether the decision was arbitrary or capricious. The University's decision does not warrant judicial intervention, and must not be disturbed, so long as it was "based upon the exercise of honest discretion after a full review of the operative facts." Matter of Mitchell v New York Med. Coll., 208 A.D.2d 929, 930, 617 N.Y.S.2d 894 (2d Dept. 1994); see also Coleman v. Hackley School, 251 A.D.2d 328, 329, 673 N.Y.S.2d 732, 732 (2d Dept. 1998) (decision to expel student based upon the exercise of honest discretion after a full review of the operative facts was neither arbitrary nor capricious so as to warrant judicial intervention); Galiani v. Hofstra University, 118 A.D.2d 572, 499 N.Y.S.2d 182 (2d Dept. 1986); Carr v. St. John's University, New York, 17 A.D.2d 632, 634, 231 N.Y.S.2d 410, 414 (2d Dept. 1962), aff'd 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962) ("When a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion").

It is beyond debate that administrators of a college or university have a legal obligation to protect students while they are on campus. For example, the Supreme Court of California held that a university had a duty to protect its students from foreseeable violence. See Regents of Univ. of California v. Superior Court, 4 Cal. 5th 607, 625 (2018). In that case, a student possibly suffering from schizophrenia initially rejected the university's attempts to provide treatment. See id. at 613. Eventually, the student, without warning or provocation, stabbed another student during a chemistry class. See id. In an action filed by the injured student against the university for tort damages, the Supreme Court of California ultimately held that colleges and universities have a duty to protect students from foreseeable violence while students are engaged in activities that are part of the school's curriculum or closely related to its educational services. See id. at

624-25. In doing so, the Supreme Court of California noted that while the law generally does not place a duty to protect others from the conduct of third parties, higher education institutions have a “special relationship” with their students such that they should be obligated to protect them from foreseeable harm. See id.; see also VanHouten v. Mount St. Mary Coll., 137 A.D.3d 1293, 1294, 28 N.Y.S.3d 433, 435 (2d Dept. 2016); Ibe v. Pratt Inst., 151 A.D.3d 725, 726, 53 N.Y.S.3d 558, 559 (2d Dept. 2017).

Fordham makes a commitment to every student to work to protect their personal safety. See Eldredge Affidavit at ¶ 15. The rapid rise in incidents of school shootings in the United States is well documented. Between the 2001-2002 and 2015-2016 academic years there were at least 190 shooting incidents on college and university campuses.¹ See id. at ¶ 47. As such, Fordham takes any threats or suggestions of violence by one of its students very seriously. Obviously, a student posting a picture of himself with a semi-automatic weapon in response to a recent disagreement with other students merited Fordham’s response. Moreover, Fordham’s decision to impose balanced disciplinary sanctions on Petitioner was reasonable and was only made after careful consideration of a multitude of factors, chief among them the safety of those in the Fordham community.

Although Petitioner ultimately argued that his June 4, 2020 Instagram post was solely related to the anniversary of the Tiananmen Square incident, Dean Eldredge believed, and common sense dictated, that it was impossible to ignore the temporal proximity between that post and Petitioner’s post from just several hours earlier regarding the death of officer David Dorn to which Petitioner received significant criticism, outrage and scorn. See Eldredge Aff. at ¶ 54. During his discussion with Fordham’s Public Safety Officers, Petitioner admitted that he had

¹ See <https://www.apaservices.org/practice/update/2018/08-23/college-campus-shootings>

just purchased the rifle he is seen holding in his post that day and that he purchased the rifle because of the recent Black Lives Matter protests. See id. at ¶ 32. In addition to admitting that he purchased the rifle in question because of Black Lives Matter protests, Petitioner stated during his hearing that he could not recall ever having posted about the Tiananmen Square incident in the past. See id. at ¶ 43. Finally, Fordham also considered the fact that a number of Fordham students believed the post was intended to harass and threaten those who disagreed with Petitioner a day earlier. See id. at ¶¶ 28-30.

From the outset, it cannot be understated that about the safety of Fordham's students is paramount. After receiving a number of messages from concerned students regarding Petitioner's post on June 4, 2020, Fordham dispatched members of its Public Safety Office that evening, with Petitioner's consent, to speak with Petitioner at his home regarding his post on Instagram and to determine whether there was an immediate threat. See id. at ¶ 31. While the Public Safety Officers determined that Petitioner was not an immediate threat to the safety of the Fordham community, that finding did not end Fordham's duty to protect its students.

Dean Eldredge, in further investigating the matter, also conducted independent research into the possible meanings behind Petitioner's posts to determine whether students' concerns about the posts were valid. In doing so, Dean Eldredge found that although the term "Don't tread on me" originated as part of the Gadsden Flag during the Revolutionary War and was meant to symbolize patriotism, the meaning of the term has shifted over time and has become more divisive. See id. at ¶ 49. Further research uncovered that, recently, the Equal Opportunity Employment Commission stated that, while not definitively racist or discriminatory, the Gadsden Flag and the term "Don't tread on me" could be the basis of racial harassment or discrimination. See id. at ¶ 50.

Given all of the above information, Dean Eldredge arrived at the rational conclusion that, while Petitioner maintained that his June 3, 2020 and June 4, 2020 Instagram posts were unrelated, his June 4, 2020 post could be viewed as a continuing threat and a warning to those who disagreed with his June 3, 2020 post. Petitioner's admission that he bought his rifle because of the Black Lives Matter protests a day after he had disagreements with Black Lives Matter supporters on Instagram was of particular concern. Further, Petitioner's position that the June 4, 2020 picture with a rifle was solely related to the Tiananmen Square incident seemed contrived given the temporal proximity between Petitioner's two posts, Petitioner's stated reason for purchasing his rifle, and the tone of the statement "Don't tread on me" made it entirely possible for Petitioner's June 4, 2020 post to have the dual purpose of mentioning the anniversary of the Tiananmen Square incident while also serving as a threat to those who disagree with Petitioner. Dean Eldredge simply could not rule out the possibility as suggested by concerned students that Petitioner was merely using the Tiananmen Square anniversary as a way to veil his threats towards those who disagree with him.

Even though Dean Eldredge concluded that Petitioner's posts violated the University Code of Conduct, he still considered Petitioner's explanation behind the posts in choosing what disciplinary sanctions to impose on Petitioner. Possible disciplinary sanctions for students that have violated the University Code of Conduct range from reprimand through suspension or expulsion. See id. at ¶ 19. Based on his findings, Dean Eldredge chose to restrict but not eliminate his access to campus and require Petitioner to take his classes remotely, among other more minor sanctions. See id. at ¶ 60-61. Dean Eldredge believed that limiting Petitioner's access to campus to a permission only basis and permitting Petitioner to take his courses online would accomplish the dual purpose of ensuring other students and those in the Fordham

community that Fordham’s campus would be safe while also allowing Petitioner to continue his studies uninterrupted. Dean Eldredge also considered the fact that, due to the COVID-19 pandemic, Fordham’s students have the option to take all of their Fall 2020 classes remotely and, as such, Petitioner would not have a significantly different academic experience from that of his classmates. See id. at ¶ 61.

It is clear from the facts that Fordham’s decision to impose balanced and fair disciplinary sanctions on Petitioner was more than reasonable and done in a good faith effort to ensure the security of its campus while taking into account the impact of the imposed sanctions on Petitioner. As stated above, the question before the Court is not whether everyone would agree with Fordham’s decision, but rather did Fordham impose sanctions that “shock one’s sense of fairness.” See Aryeh v. St. John's Univ., 154 A.D.3d 747, 748, 63 N.Y.S.3d 393, 395 (2d Dept. 2017); see also Bilicki v. Syracuse Univ., 67 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2019) (upholding university’s decision to expel student for posts made on social media and holding that “[t]he expulsion of the petitioner, who was fairly close to completing requirements for his degree, may be viewed by some as debatable but it was not shocking to the conscience as a matter of law.”).

As such, because the decision to impose sanctions upon Petitioner was made in an exercise of honest discretion after a full review of the operative facts, Petitioner’s motion should be denied and the Petition should be dismissed.

POINT III

PETITIONER’S CLAIMS UNDER THE FIRST AMENDMENT ARE MISPLACED

Although he acknowledges that Fordham, as a private university, is “not bound by the First Amendment,” Petitioner makes numerous references to constitutional rights he believes Fordham failed to afford him. In his Petition, Petitioner makes a strained attempt to equate the

rights of Fordham students to freely express themselves, as described in Fordham's various policies, with the broad constitutional free speech rights provided under the First Amendment. While some of Fordham's written policies state that members of the Fordham community have a right to free expression, as discussed above, this right is not unlimited and is certainly not as broad as the free speech rights protected under the First Amendment.

The First Amendment and New York State Constitution protect individual freedoms from government interference; they do not protect individual freedoms from interference from a private organization. See SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985); People v. Raab, 163 Misc.2d 382, 621 N.Y.S.2d 440 (Dist. Ct., Nassau Cnty. 1994). "As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).

Infringement on individual freedoms can be found against a private organization, but generally only when "the government has participated in the private conduct to such an extent that the conduct can be deemed to be fairly attributable to the state." Raab, 163 Misc.2d at 386, 621 N.Y.S.2d at 443 (internal quotations omitted); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982) (focusing on "whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision" to discern whether a private organization infringed on an individual freedom) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

"Neither private universities nor their employees are 'state actors' for the purpose of constitutional claims, including claims alleging violation of the right to free speech." Mitchell v. New York Univ., 129 A.D.3d 542, 544, 12 N.Y.S.3d 30, 33 (1st Dept. 2015) (citing Powe v. Miles, 407 F.2d 73, 80-81 (2d Cir. 1968) (holding that "the state must be involved not simply

with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.”)); see also Commodari v. Long Island Univ., 89 F.Supp.2d 353 (E.D.N.Y. 2000), aff’d, 62 F. App’x 28 (2d Cir. 2003) (same). As the court found in Bellis v. Albany Medical College of Union Univ., 136 A.D.2d 42, 525 N.Y.S.2d 932 (3d Dept. 1988), “[w]hile students at public universities are entitled to due process, students at private universities cannot invoke such rights unless they meet the threshold requirement of showing that the State somehow involved itself in what would otherwise be deemed private activity.” (internal citations omitted); see also Stone v. Cornell Univ., 126 A.D.2d 816, 510 N.Y.S.2d 313 (3d Dept. 1987) (asserting “[a] threshold requirement to invoking the State’s constitutional due process provision is a showing that the State has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity”, and finding that although defendant, a private university, received financial assistance from the State, that alone does not constitute a sufficient degree of state involvement to allow an intrusion into the university’s disciplinary policies) (internal quotations omitted).

Even though many private colleges and universities choose to include language in their policies and procedures that protects students’ rights to freely express themselves, because they are not public actors private colleges and universities are also permitted to place limitations on students’ right to free expression. See Bilicki v. Syracuse Univ., 67 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2019) (holding that although Syracuse University’s code of conduct contained language protecting students’ right to free expression, this right was not unlimited and was subject to other provisions in the code of conduct prohibiting speech that was considered harassing or threatening).

In attempting to establish his free speech claims, Petitioner cobbles together a number of Fordham's policies including the University's Demonstration Policy, Mission Statement, University Code of Conduct and regulations regarding Bias-Related Incidents to create an absolute free speech right.. See Petition at ¶¶ 42-48. Petitioner is simply wrong. First, Petitioner does not claim that he was attempting to make any kind of demonstration on Fordham's campus. As such, the University's Demonstration Policy is clearly inapplicable.

Petitioner also cites to portions of Fordham's Mission Statement as being applicable. Fordham's Mission Statement reads in pertinent part:

Fordham strives for excellence in research and teaching, and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth . . .

In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own.

Mission Statement, FORDHAM UNIV. (Apr. 28, 2005), available at https://www.fordham.edu/info/20057/about/2997/mission_statement.

Nothing in Fordham's Mission Statement supports Petitioner's thesis that the right to "freedom of inquiry" allowed him to post veiled threats online against those who disagree with him without fear of recrimination from Fordham. As such, Fordham's Mission Statement is also inapplicable in this matter.

Finally, Petitioner also references provisions of the University Code of Conduct regarding Bias-Related Incidents. See Petition at ¶¶ 45-48. Specifically, Petitioner refers to Section "9" of the University Code of Conduct which prevents a Fordham student from "[e]ngaging in or inciting others to engage in conduct which interferes with or disrupts any University function, or which prevents or limits the free expression of the ideas of others." See Petition at ¶ 45.

Regardless of whether the University Code of Conduct (which speaks only to student conduct) can be applied to an action taken by the University, the Code of Conduct specifically limits students' rights to free expression. Section "6" prohibits "[p]hysical abuse, sexual abuse, threats, intimidation, coercion, and/or other conduct which threatens or endangers the health or safety of any person." See Eldredge Aff. at ¶ 9. Further, students are also prohibited from "[e]ngaging in lewd, licentious, or disorderly conduct" under Section "11" of the University Code of Conduct. See id. at ¶ 10. Consequently, while Fordham students are granted the right of free expression, that permission is not unfettered and they are not allowed to express themselves in a way that would harass another person or threaten or intimidate others.

Finally, even if the University Code of Conduct did create an absolute right to free speech that is as robust as those rights protected by the First Amendment, which it clearly does not, Petitioner would find no solace because even the free speech protections afforded under the First Amendment are not absolute. "Constitutional free speech protections 'have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses.'" People v. Shack, 86 N.Y.2d 529, 535, 658 N.E.2d 706, 710 (1995)(citation omitted). It is well settled that "[t]he freedom to exercise one's right of free speech is often curtailed temporally, geographically or even demographically. Like Justice Holmes' famous example, even 'the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.'" United States v. Turner, No. CRIM 09-00650, 2009 WL 7265601, at *1 (E.D.N.Y. 2009) (quoting Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470 (1919)). Thus, considering the limitations on Constitutional free speech rights, a private university like

Fordham certainly has the right to curtail any free expression privileges it grants. Thus, Petitioner's free speech claims must fail.

POINT IV

RESPONDENT FATHER McSHANE IS NOT A PROPER PARTY TO THIS ACTION

In addition to naming Fordham and Dean Eldredge as respondents in this action, Petitioner also names Fordham's President, Father Joseph M. McShane, S.J., as a respondent. Fordham understands that an Article 78 action may be brought against a "body or officer" which includes "every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding" under Article 78. N.Y. C.P.L.R. §7802. However, nowhere in his Petition does Petitioner claim that Father McShane was in any way involved in his disciplinary hearing or the decision to impose sanctions on him as Dean Eldredge confirms in his affidavit. See Eldredge Aff. at ¶ 5. In fact, Father McShane is not mentioned at all throughout any substantive portion of the Petition. As such, should the Court decide not to dismiss the Petition in its entirety, at a minimum, Father McShane should be dismissed as a respondent in this action.

POINT V

PETITIONER IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

Because Petitioner's Petition should be dismissed, his motion, brought by order to show cause, seeking a preliminary injunction should also be denied as moot. Nevertheless, should the Court choose to not dismiss the Petition, Petitioner's request for a preliminary injunction should be denied.

"A preliminary injunction is a drastic remedy that should not be granted unless a clear legal right thereto is shown." McGuinn v. City of New York, 219 A.D.2d 489, 489, 645

N.Y.S.2d 770, 771 (1st Dept. 1995). “In order to obtain a preliminary injunction, a movant must present clear and convincing evidence establishing: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of preliminary injunctive relief, and (3) a balancing of equities in favor of the movant.” East Coast Drilling, Inc. v. Total Structure Enterprise, Inc., 106 A.D.3d 688, 689 (2d Dept. 2013); see also Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); New York Auto. Ins. Plan v. New York Sch. Ins. Reciprocal, 241 A.D.2d 313, 314, 659 N.Y.S.2d 881, 882 (1st Dept. 1997). “The function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits” Olympic Tower Condo. v. Coccoziello, 306 A.D.2d 159, 160, 761 N.Y.S.2d 179, 180 (1st Dept. 2003) (citation omitted).

A. Petitioner Impermissibly Seeks His Ultimate Relief By Way of a Preliminary Injunction

Generally, a request for a preliminary injunction should be denied where the party requesting such an injunction would receive the ultimate relief they seek without a judgment on the merits. See 135 W. Broadway LLC v. 137 W. Broadway Owners Corp., 181 A.D.3d 548, 122 N.Y.S.3d 8, 9 (1st Dept. 2020). “It is settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment.” SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727, 728 (2d Dept. 2005).

Here, there is no need for a preliminary injunction since the parties have stipulated that Petitioner need not comply with the affirmative portions of the sanctions (completing implicit bias training and writing a letter of apology) until this matter is resolved. See Ryan Affirmation, Exhibit “C” at p. 2. Further, the passive portions of the sanctions (online learning and access to campus by permission only) are unfortunately the new reality being experienced by many other

Fordham students during the COVID-19 pandemic and Petitioner is no exception. Nevertheless, Petitioner is seeking to have enforcement of those two disciplinary sanctions stayed while this action is pending. Specifically, Petitioner requests to have “any and all disciplinary sanctions” issued against him annulled by this Court. See Petition at ¶ 67. Granting Petitioner a preliminary injunction staying enforcement of those two disciplinary sanctions (online learning and access to campus) imposed against him would essentially grant him this relief. Further, a stay of enforcement of those sanctions issued against Petitioner would directly interfere with Fordham’s ability to maintain the security of its campus for all those in the Fordham community. Conversely, since Petitioner is effectively experiencing what other students are experiencing during the pandemic, imposition of those sanctions do not cause him significant, if any, harm.

B. Petitioner Cannot Succeed on the Merits of His Claims

“The party seeking a preliminary injunction must make a clear showing of a likelihood of success on the merits.” Sussman Educ., Inc. v. Gorenstein, 175 A.D.3d 1188, 1189, 109 N.Y.S.3d 39, 40 (1st Dept. 2019) (citation omitted); see also H.D. Smith Wholesale Drug Co. v. Mittelmark, 33 Misc. 3d 1227(A), 941 N.Y.S.2d 538 (N.Y. Sup. Ct. 2011)(“[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers.”). Conclusory statements or statements that lack evidentiary detail are insufficient to establish a likelihood of success on the merits. Aug. v. Schwartz, 50 Misc. 3d 1224(A), 36 N.Y.S.3d 46 (N.Y. Sup. Ct. 2016).

As explained in detail above, Fordham clearly followed all of its policies and procedures in choosing to impose limited disciplinary sanctions on Petitioner. Further, Fordham’s decision was made in good faith after a full and fair review of all the relevant facts and information. The targeted sanctions imposed on Petitioner were designed to serve the dual purpose of ensuring that

Fordham's campus was safe for all of those in the Fordham community while still allowing Petitioner to continue his education uninterrupted. As such, Fordham's decision was neither arbitrary nor capricious. As such Petitioner cannot succeed on the merits of his claims and his request for a preliminary injunction should be denied.

C. Petitioner Has Failed to Establish Irreparable Injury

For the purposes of a preliminary injunction, "irreparable injury" is an injury that cannot be redressed through a monetary award. Walsh v. Design Concepts, Ltd., 221 A.D.2d 454, 455, 633 N.Y.S.2d 579, 580 (2d Dept. 1995). A party seeking a preliminary injunction must show that "the injury is threatened and imminent." Samuelson v. Yassky, 29 Misc. 3d 840, 848, 911 N.Y.S.2d 570, 578 (Sup. Ct. 2010).

Here, Petitioner's claim that he will suffer irreparable injury absent an injunction makes little logical or legal sense. Petitioner claims that he will be irreparably injured because if he does not write an apology letter, as was required as part of his sanctions, he could face suspension or expulsion for failing to comply with the University's disciplinary sanctions. That "injury" has been obviated by the stipulation between the parties. Petitioner also claims that he would suffer irreparable injury by being prevented from using Fordham's on campus resources and being denied the "college experience." This claim is also meritless because, as stated above, many, if not a majority, of Fordham students will be taking classes entirely remotely for the Fall 2020 semester due to the COVID-19 pandemic. As a result, Petitioner will have the same academic experiences and opportunities as other students at Fordham.

Further, there is no legal basis for Petitioner's claim that he is being denied a constitutional right, such that no further showing of irreparable injury is necessary. As stated in detail above, Fordham is a private university and therefore, constitutional free speech protections

do not apply. In addition, Fordham's policy regarding students' right to free expression is clearly limited by additional provisions in its policies that prevent students from expressing themselves in a way that is harassing or threatening to others. Therefore, Petitioner has failed to establish that he would suffer irreparable injury absent an injunction.

D. A Balancing of the Equities Favors Respondents

Finally, the equities clearly balance in favor of Fordham. As established above, Fordham followed all of its policies and procedures in imposing disciplinary sanctions on Petitioner. Further, Fordham chose to impose sanctions that would not interrupt Petitioner's studies despite the serious implications behind his social media posts. Moreover, Fordham has a significant interest in protecting its campus and its students from any potential threats. Enjoining Fordham from enforcing its sanctions against Petitioner could have an extremely adverse effect on campus safety leading to far more irreparable injury than anything Petitioner claims he is experiencing. As such, Petitioner's request for a preliminary injunction should be denied.

CONCLUSION

The University has demonstrated, as a matter of law, that Petitioner Austin Tong has not set forth a cognizable cause of action under New York law. The Petition should be dismissed in its entirety pursuant to CPLR § 3211(a)(7) and CPLR § 3211(a)(1), Respondent Joseph M. McShane should be dismissed as a respondent in this action, and Petitioner's motion for a preliminary injunction should be denied, together with such other relief as this Court deems just and proper. In the event the Court denies the motion in whole or in part, the University should be permitted to answer the petition pursuant to CPLR § 7804(f).

Dated: August 14, 2020
Garden City, New York

Respectfully submitted,

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