No.

In The
Supreme Court of the United States

MATTHEW JACOBSON,
Petitioner,
v.

BUTTERFLY BLAISE, Title IX Coordinator, SUNY Plattsburgh, LARRY ALLEN, Director of Student Conduct, SUNY Plattsburgh, BRYAN HARTMAN, Vice President for Student Affairs, SUNY PLATTSBURGH STUDENT CONDUCT BOARD,
Respondents.

On Petition For A Writ Of Certiorari To The New York State Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process, Equal Protection and Privilege and Immunities Clauses of the United States Constitution, and the Constitutional Guarantees of a Fundamentally Fair Trial applicable to New York through the Fourteenth Amendment, require that an accused charged with what otherwise would be a criminal offense in a statutorily mandated student disciplinary proceeding at a public university be afforded a meaningful opportunity to be heard and judged by objective evidence in a fair, impartial, unbiased and untainted forum by individuals free of any conflict of interest and be given the opportunity to confront adverse witnesses and present a material, relevant and probative defense in a fair and equitable manner.

PARTIES TO THE PROCEEDING

The original parties to this case were Matthew Jacobson v. Butterfly Blaise, Title IX Coordinator, SUNY Plattsburgh, Larry Allen, Director of Student Conduct, SUNY Plattsburgh, Bryan Hartman, Vice President for Student Affairs, SUNY Plattsburgh and the SUNY Plattsburgh Student Conduct Board. Rule 14.1(b) of the Supreme Court Rules.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. Matthew Jacobson v. Butterfly Blaise, et. al., New York State Court of Appeals, Slip Op 65180 (N.Y. 2020), Mo. No. 2019-1000, March 31, 2020.

2. Matthew Jacobson v. Butterfly Blaise, et. al., New York Appellate Division, 3d. Dept., 175 A.D. 3d 1629, (N.Y. App. Div. 2019), September 12, 2019.

3. Matthew Jacobson Notice of Judicial Outcome Review, Student Conduct Board, SUNY Plattsburgh, June 5, 2018.

4. Matthew Jacobson Notice of Judicial Outcome, Student Conduct Board, SUNY Plattsburgh, May 9, 2018.

5. Matthew Jacobson v. Butterfly Blaise, et. al., New York Appellate Division, 3d. Dept., 157 A.D. 3d 1072, (NY App. Div. 2018), January 11, 2018.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Matthew Jacobson, respectfully prays that a writ of certiorari be issued to review the order of the New York State Court of Appeals entered in the above-entitled case on March 31, 2020 and, derivatively, the judgment of the New York State Supreme Court, Appellate Division, Third Department, entered on September 12, 2019.

DECISIONS BELOW

The March 31, 2020 order of the New York State Court of Appeals, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, page App. 1. Additionally, the underlying judgement dismissing Petitioner's Article 78 petition from the New York State Appellate Division, Third Department dated September 12, 2019 is reprinted in Appendix B, pgs. App. 5-13.

STATEMENT OF JURISDICTION

The order of the New York State Court of Appeals to be reviewed was entered on March 31, 2020, with Notice of Entry filed April 9, 2020. The instant Petition is filed within 90 days of the date of decision and within any extension granted by this Court. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C section 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED[1]

U.S. Const. Article IV, Section 2

U.S. Const. Amend V

U. S, Const. Amend XIV, Section 1

28 U. S. C. Section 1257(a)

STATEMENT OF THE CASE

In response to what was widely perceived as the failure of college administrators to adequately address claims of sexual misconduct at institutions of higher learning, the United States Department of Education issued guidelines in April of 2011 significantly modifying Title IX regulations concerning the reporting and handling of such claims and defining an "affirmative consent" approach to be used at student disciplinary proceedings created to hear such accusations[1].

Its proponents championed its provisions limiting accuser exposure to further "trauma" in an

[1]The Department determined that said letter is a "significant guidance document" pursuant to the OMB. See Dear Colleague letter issued April 4, 2011 and http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good _guidance.pdf.

alleged non-adversarial proceeding conducted by college personnel and adjudicated by lay student conduct panels without the formalities and rigidity associated with recognized legal tribunals by limiting confrontation and cross examination, reducing the burden of proof, avoiding legal "technicalities" as well as modifications of other generally accepted due process principles. Such inquiries, employing a "single investigator" model pursued in this administrative adjudication type setting was considered more protective of and beneficial to accusers than formal civil and criminal proceedings and help foster the concepts of "victim centered justice" and the "rape trauma syndrome" by changing the focus of such inquiries from the consideration of generally accepted objective, credible and verifiable evidence in favor of the subjective thoughts, feelings and perceptions of the accuser/victim.

Opponents decried such modifications as deprivations of the rights of the accused considering that the inquiries involved what would otherwise be serious criminal acts and that the regulations' attempt to balance the equities in this manner was actually creating anti-male gender bias and violating equal protection concepts, especially in light of the fact that such inquiries would be conducted by the very people whose ignorance and negligence caused the problem in the first place, and would be adjudicated by lay individuals ignorant of legal principles and not

competent to consider such issues when the system provided existing tribunals and forums much better suited to do so protecting the rights of all parties involved[2].

The regulations further created an expensive and nightmarish new funding and administrative bureaucracy when none was needed. The idea of the "campus rape frenzy" and "campus rape courts" was born in popular literature and scholarly journals[3], and the investigatory and hearing process it created amounted to nothing more than a "witch hunt" with "star chamber" proceedings, "kangaroo courts", and an "inquisition" in lieu of a fair trial. The findings made by these campus disciplinary proceedings amounted to nothing more than a legal lynching.[4]

Bedsides academic and social debate resulting in countless published articles and commentaries offering different views on the subject, it led to thousands of law suits throughout the country at different levels and it is estimated that over 600 such

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[2] For a well balanced scholarly analysis, see "The Uncomfortable Truth About Campus Rape Policy" by Emilt Toffe published in Education, September 7, 2017.

[3] See The Campus Rape Frenzy: The Attack on Due Process at America's Universities, (2017), by K.C. Johnson and Stuart Taylor Jr..

[4] See Why Campus Rape Tribunals Hand Down So Many "Guilty" Verdicts by Stuart Taylor, November9, 2017

related due process suits are currently pending.[5] If respondents' position is correct and the changes in the regulations and the law it spawned in New York was intended to achieve social reform by radically changing the weight given to subjective vs. objective evidentiary principles, then this radical departure from traditionally relied upon substantive due process considerations requires ever more reliance on strict application of and conformity to procedural due process concepts to insure any possibility of a fundamentally fair, transparent, unbiased and objective impartial hearing process.[6]

The curtailment of the accused's due process protections and fundamental unfairness of the hearing process created led to the withdrawal of said

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[5] See Title IX for All, April 2020 update. Additionally, 47.5 % of these cases were filed in only 5 states with New York responsible for 12% of which the SUNY system accounts for a disproportional amount. In the state's two public higher learning systems, SUNY and CUNY, (City University of New York), SUNY has a 63.3% and CUNY a 78.5% "guilty" rate. See Minding the Campus by K. C. Johnson (https://www.mindingthecampus.org/) in which he accounts for this as the doing of the Governor who spearheaded the adoption of Enough is Enough and further appoints the majority of members to the CUNY and SUNY governing boards.

[6] On August 12, 2019, the ABA House of Delegates voted to postpone indefinitely a vote on Resolution 114 which specifically sought to infuse these new definitions of consent in sexual assault cases into the criminal law.

guidelines by the Department in the fall of 2017 with an announcement by the Secretary of Education that "no student should have to sue to get due process." In issuing new regulations in May of 2020, the Secretary stated "we can continue to combat sexual misconduct without abandoning our core values of fairness, presumption of innocence and due process" by bolstering the rights of the accused and abandoning a "failed approach" that turned campus disciplinary panels into "kangaroo courts". [7] The new rules specifically address such due process issues by guaranteeing the presumption of innocence and raising the burden of proof as well as requiring access to advocacy and discovery to bolster fairness to the accused, as well as other generally recognized due process concerns.

In 2015, New York enacted Article 129-B of the New York Education Law, effective October 5, 2015, (Appendix G, pgs. App. 86-116) which became known as the "Enough is Enough" law, essentially codifying the now withdrawn and discredited Title IX regulations of 2011 including Section 6441 regarding "affirmative consent" to sexual activity. This statute remains in effect despite the withdrawal of the regulations on which they were based. The incident involved occurred in October of 2015, making it the

[7] See Newsday, May 7, 2020, page A 38.

first one arising entirely under New York's newly enacted law.

The enactment of this legislation gave its provisions not only the imprimatur of state action, but the "quasi-judicial" proceedings it created and the decisions it made official state action with the force of law. In doing so, it elevated the authoritative participants in it to the respected and protected position of state and governmental actors; but as representatives of the state it also imposed on them the requirements, obligations and duties associated with such position. What might otherwise have previously been private considerations were now state actions with the full force and authority of governmental functions in the public State University system and therefore subject to the requirements of the Constitution and the protections afforded by it. What otherwise might have been mere academic policy or social and political agenda now became enforceable governmental action. Any policy to "protect" accusers must now be subject to Constitutionally mandated protections of the accused.

At the time of its enactment, Petitioner was an undergraduate student at the State University of New York (SUNY) campus in Plattsburgh, New York. He choose this school because, with his numerous advanced placement credits, it offered an opportunity to graduate with an accounting degree and CPA certification in a compressed time frame and enter law

school, as intended, and the Honors Program he was accepted into and the financial incentives given. Sometime in early 2016, he received a request from Respondent Blaise, the Title IX Coordinator to appear for a conference with her but was told nothing else. At the meeting, he was advised by Blaise that she wished to discuss a sexual encounter he had with another student the previous Halloween. He was not advised that she was investigating any alleged complaint of sexual misconduct or given any notice of possible charges or specifications, nor was he advised of his rights or options concerning counsel or advice concerning this discussion. He advised her that he had met the other student through Tinder, a popular dating application known for fostering "sexual hookups". He advised her that after a fraternity Halloween party, she had invited him to her dorm room where they were both drinking and then engaged in numerous multiple and varied consensual sex acts for over seven hours. He was not asked to review much less sign off on any alleged statements he supposedly made.

In May, he was advised that he was being charged with 2 violations of the Student Conduct Code involving sexual misconduct and a hearing would be scheduled for some 3 or so days later. As this was finals week, the hearing had to be rescheduled for a few days because he had final exams on the date selected. He was not given any further information or

specifications and told to review the Code for any further information.

The first time he or his counsel saw the alleged evidence and specifications was at the hearing which lasted some 50 minutes including the breaks the defense took to review the newly provided information. The transcript ran some 10 pages and the redacted version is found at Appendix. H, pgs. App. 117-143. Petitioner was brought before the Student Conduct Board, a tribunal composed of students and faculty or staff members of the institution. He was asked if the Board composition is acceptable to him. He was told both by the Chairman and in the institution's publications that these panels are composed of volunteers who are allegedly screened and "properly trained" for this purpose, which Respondent's counsel confirmed in a reply to a question posed by a Justice in the Appellate Division's oral argument. He had no access to their names or position in the institution prior to the hearing and certainly had no idea of their background. The alleged accuser was not present and was supposedly observing via SKYPE, but this was a one way view and she was never heard or observed by anyone in the hearing room much less questioned by anyone. Blaise, the Title IX Coordinator, and acknowledged in Respondents' publications as the person primarily responsible for the training and selection of the student conduct panel, who had already acted as the investigator, became the

"complainant" pursuant to Respondents' rules, and also acted as prosecutor in presenting an "evidence packet" which she prepared including findings of fact and conclusions of law and even though Respondent Allen, the "facilitator" was present, effectively conducted the hearing by ruling on relevance and admissibility. (One might think that this use of the so called "single investigator" model, allowing the same person to perform these otherwise conflicting roles might be appropriate in academia, but in an adjudicatory forum might require an even greater adherence to substantive and procedural due process protections than would be otherwise expected.) In essence, Blaise erroneously defined "affirmative consent" as relying on verbal communication between the participants and ignoring "actions" as required by the enabling law. Since such approach is specifically suggested by and in accordance with the college's own published recommended guidelines, one must wonder if this was mere "error" or intentional disregard of the law's mandates. She further defined "initiation", the triggering mechanism in invoking the statute as "penetration", despite the fact that no such definition exists in the enabling law, is counter intuitive and would obviously mean that only a male could be held "responsible" in heterosexual liaisons and thus violate this allegedly gender neutral law. (Blaise's statements as found in the transcript at Appendix H makes her influence and control of the Board and

process crystal clear, and exposes the impossibility of any neutral or unbiased decisions.)

Within an hour of the hearing, Petitioner received a decision dismissing him from school which was confirmed following an internal appeal process. He was found responsible for violating 2 provisions of the Student Conduct Code regarding sexual violence,[8] and expelled from school. [9] He was readmitted after a stay was granted by the New York Supreme Court Appellate Division, Third Department pursuant to an Article 78 proceeding challenging Respondents' finding which the Court later annulled but remitted for further proceedings. The Court annulled Respondent's findings based on, amongst other things, what it found to be faulty and erroneous definitions provided to the Board by Blaise which were inaccurate and prejudicial and improperly admitted against Petitioner by Allen further finding the evidence

[8] One of these violations concerned performing acts that would essentially be violative of the criminal Penal Law. Petitioner has never been investigated, questioned, arrested or charged by any law enforcement officer or agency, much less convicted of any violation of any law by any court of competent jurisdiction.

[9] Petitioner was provided with discovery during this first litigation which indicated that such expulsion was to be for 40 years. Ironically, had he been convicted even of a Class A violent felony, he would have been eligible for admission to college upon completion of his term of incarceration of 20 years, especially under SUNY's policy of not inquiring as to previous felony convictions!

tainted and insufficient for any further review. The remitter came over a vigorous dissent. The decision is found in Appendix E, pgs. App. 58-82. (In dissenting to Respondents' "due-over" opportunity to clean up their act, the dissenters pointed out the due process deprivations making a constitutionally fundamentally fair proceeding impossible.)

Petitioner was devastated and deeply depressed over the loss of one full academic year considering he chose this school precisely for its ability to get him to law school on an accelerated basis. He was also forced to give up the presidency of his fraternity to which he had been elected to. He returned to SUNY Plattsburgh to avoid the loss of any more time. Unfortunately, the year interruption had taken its toll and he found he could no longer concentrate with the vigor he had previously. Rather than endanger his Honors Program or jeopardize his academic standing, he dropped the accelerated accounting program so as to now graduate within one year and was accepted to law school. This devastating loss paled in light of what was to come, (App. C, pgs. App. 37-38), and considering Petitioner's innocence, is not "educational" but purely vengeful and punitive.

Respondents brought the same action in April of 2018. Because his previous experience made it clear that Respondents had little if no regard for either equity or fair play, and no concept of due process protections to one accused of what would otherwise be

a heinous crime, Petitioner attempted to set ground rules prior to the second hearing and insure a fair hearing this time around and to attenuate and remove the taint of the previous hearing (See App. C, pgs. App. 14-15). This was especially true as the Student Conduct Code had been changed and revised at least once since the prior hearing; a point Petitioner raised when Respondents' requested a "do-over" the first time around. Which set of rules would apply? However, as Petitioner would soon learn, when the rules can be unilaterally changed in the middle of the game, even those specifically chosen to govern the proceeding, Respondents rules were intentionally designed to allow them to avoid any rules, even their own.

While the lack of notice, discovery and preparation time was now not a factor, the issue of the governing rules were a major issue as Respondents revisions had incorporated many of Petitioner's objections into their "new" procedure that could substantially change it from the prior hearing. Allen, the "facilitator" of the hearing equivalent to the Administrative Law Judge, unilaterally ruled that:

"substantive definitions of the Student Conduct Manuel as published at the time of incident will be used but the current Student Conduct Manuel will be used as it relates to the procedure for running the hearing proceedings";

"evidence that will be utilized for this case will be exactly the same evidence that was utilized for the original case and hearing";

Allen failed to address the concerns raised by Petitioner regarding him running the hearing since he was a named Respondent in the previous litigation and as the "facilitator" of the previous hearing, the person considered most at fault for admitting the offending erroneous and improper definitions that led to the reversal.

While Petitioner certainly never consented to this approach, we point out that *de novo* hearings are not uncommon and rule changes sometimes occur between hearings. What is novel is the unilateral selection by the tribunal who has declared itself a direct party to the matter of rules from a smorgasbord of procedural codes selecting those rules considered most favorable to them. This 1 from column A and 1 from column B approach is offensive to due process in itself. But what matter rules if you don't follow them anyway? Allen's ruling regarding "exactly the same evidence" became the law of the case which Petitioner could certainly reasonably rely on. In choosing the rules and making his ruling however, Allen failed to realize that the "exact same evidence" would be inadmissible under the rules of the new Code he chose; a problem he alleviated by simply ignoring and reversing himself in the middle of the hearing. Petitioner was certainly justified in his concerns about

Allen running the new hearing. Considering the trouncing of his previous efforts by the Court, his designation to hear the remitted hearing was improper as was its appearance at the very least.

Moments before commencement of the hearing, Allen advised that the alleged victim, who had not testified in the prior hearing and was not listed as a witness on the witness list that had to be provided in advance as required by the rules of procedure he unilaterally chose, had arrived and was being allowed to testify. Thus the evidence would not be the "exact same" and at least that portion of his self-chosen rules would not be in effect. Petitioner was not given the opportunity to address this decision in contradiction of Allen's established law of the case and against Respondent's published policy, and while we welcomed the opportunity to confront the accuser in an open forum and see if she had actually even written the unsigned, undated and uncorroborated statement placed in evidence on her behalf in the previous hearing, no one could even fathom that Allen would rule that she could decide what questions she would or would not answer! At the very least it conclusively established that *ex parte* communications were taking place between Allen as facilitator and Blaise, investigator, prosecutor, complainant advisor and witnesses that would be called by Respondents. The failure to insulate and separate the prosecutorial and adjudicative functions of this administrative tribunal,

inherently recognized in the Court's decision annulling its prior ruling, had, like the fruit of the poisonous tree, continued to taint the new hearing without attenuation. Can there be any greater evidence of impropriety and collusion, or of due process deprivations? In the review of college disciplinary proceedings even before Title IX related issues, the Courts have consistently ruled that if nothing else, the college must follow its own published promulgated rules to make its decisions lawful. If Respondents fail to follow their own rules, can we reasonably expect them to follow any other governing rules?

After the hearing commenced it became clear that any taint that existed would now be institutionalized and compounded as the rulings that followed only served to vitiate any semblance of a fair proceeding. Despite the obvious appearance of impropriety due to the circumstances previously described, Allen went on to reject any of Petitioner's challenges to his conducting the hearing by saying that he is the college's designee and the only one qualified to do so, even though the rules say he can delegate that authority. But according to Respondent Hartman's final decision, (Appendix C, pgs. App. 14-39), the appearance of impropriety is insufficient cause to question the process. Under the circumstances described, this "appearance" is more of a smoking gun. While allowing some basic questions

of the proposed panel members, he denied Petitioner's request to *voir dire* them concerning their relationship to Blaise or the Gender Women's Studies Program, their alleged training or how and why they were selected to hear this matter. In essence, the accused is being judged by individuals selected solely by the complainant, as Respondents consider themselves, with no input, vetting or qualification by anyone other than Respondents in a proceeding designed, established, promulgated and conducted by them and controlled by one of the parties to the matter by their own definition. None of these participants have any legal training or experience and have no legal or ethical obligation to pursue their duties pursuant to law or the concepts of justice![10]

Allen did everything within his promulgated authority to insure that the panel would be exposed only to what they wanted it to hear and further departed from basic due process and common sense

[10] At the hearing, all members of the Board stated that they knew nothing about the case or the previous hearing. If this is true, and as the Court's previous ruling clearly affected or should have affected Respondents' procedure, than just what are the Board members trained in? Either they are not properly trained, unless of course the trainers consider Court rulings irrelevant, or they were clearly lying. Since Blaise is the only one Respondents admit is responsible for training, the latter conclusion unfortunately seems more reasonable, especially considering the financial incentives involved as the new proposed Title IX Regulations contain budgetary projections of close to 300 million dollars.

notions of fundamental fairness. Over objection, Allen allowed the alleged victim, who had not participated in the prior hearing, to remain in the hearing room during the testimony of all parties and witnesses. Considering issues were raised in the first matter as to whether she was ever present through SCYPE and the true authorship of her alleged statement was in issue, this failure to sequester her not only runs counter to normal contested hearings but allowed for the tailoring of evidence and encouraged and fostered recent fabrication as shown by the fact that she seized on Blaise's description of "rape" even though she had herself never used the word before. It also allowed her to make an "impact statement" in lieu of a closing statement which is specifically prohibited by the enabling Enough is Enough law which the allegedly "trained" Allen allowed in. And while counsel could follow her statement because she read it into the record verbatim, (Appendix H, pgs. App. 121-129), Allen was repeatedly advised that counsel could not hear her other answers, statements and improper impact statement, but ruled that irrelevant, as long as the recorder picked it up and openly allowed Respondents to block counsel from seeing her directly to read her lips so as to fulfill his function to advise the accused.

While Petitioner concedes that a body of law has developed limiting both confrontation and cross examination in these forums of alleged victims so as to

reduce their exposure to additional trauma, no decision has ever granted such witness *carte blanche* if they voluntarily waive such protections and testify directly, as she did herein and was so acknowledged by Respondents' decision. Allen ruled that no witness was required to answer any question they did not want to for whatever reason! Considering that Respondents' rules do not allow for limiting instructions or directions on adverse inferences or orders to strike, which they freely concede in their decision, and that said witnesses are not sworn and there is no guarantee of veracity, this approach is not only laughable but disgraceful. The hearing is not a hearing but a diatribe, or perhaps a college lecture! Due process demands that there is a means of holding the witnesses' feet to the fire. Adding to this and despite the testimony in the previous hearing, Allen rules, again over objection, that nothing from the previous hearing, including prior inconsistent statements or outside statements indicating bias, prejudice or predisposition may be introduced and are presumptively irrelevant! Only the testimony as introduced at this hearing may be considered. This prevented any attempt to impeach testimony even though Blaise clearly testified differently this time around and such cross examination was clearly appropriate considering her history and conflicting together with roles. Together with Allen's prior ruling allowing witnesses to simply ignore any question they didn't like, it illustrates the depths Respondents will

sink to vitiate any meaningful due process protections the accused might have and to prevent even the pretext of a fundamentally fair hearing. Considering that Blaise's so entitled "summary" of Petitioner's alleged "statement" (Appendix H, pgs. App. 129-133) that was not seen or acknowledged by him in which he "admits" "initiation" and thus triggers the statute by "penetration" was again admitted in evidence despite Allen's chosen set of rules saying they were inadmissible, and was such a crucial part of the of the Court's reversal that the "trained" Board said they never heard of, intense cross examination of Blaise was clearly necessary and appropriate.

The hearing that flowed from these legally unjustifiable rulings inevitably again resulted in Petitioner being found in violation of a provision of the Student Conduct Code regarding sexual violence for allegedly failing to establish that he had obtained "affirmative consent" (Appendix D, pgs. App. 40-57). Despite the fact that this encounter was continuous and lasted for over seven hours during which both parties left to use the rest room and returned, the room was entered by the accuser's roommate, the accuser admitted telling Petitioner specifically not to use a condom and that she declined certain sex acts which did not take place, was awake and aware of temporal and geographic circumstances and otherwise exhibited all the recognized indicia of a consenting party and texted with Petitioner the next night, the

Board none the less found that she was intoxicated to the point of incapacitation, or suffered from "rolling black outs" and was asleep only at the instances of the initiation of the three separate instances of sexual intercourse, despite the facts and circumstances in between such instances. One would think that despite any statutory wording not requiring it, a woman who admittedly describes herself as cognizant of her surroundings and circumstances who honestly believed she was being "raped" and had been "rapped" at least once before during their time together that night would just say "no", "stop" or "no more", or just leave.

Even though he had completed all required curriculum criteria for graduation, maintaining his numerous academic achievement honors in the process and was allowed to attend commencement and honor awards ceremonies, he was denied his degree and certified final transcript making his admission to his accepted law school impossible as part of the three year suspension "hold" on his credentials.[11]

That these rules are designed to create a non-level playing field becomes clear from their

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[11] The original suspension was for 4 years, but reduced to three. While Respondent's point to this as evidence of the unbiased nature of Allen, in reality, the suspension could only be for 3 years considering the rules chosen by Allen now only allowed for a maximum of a 4 year suspension and Petitioner had already unjustly served one year.

impact/penalty phase and internal appeals processes. The lack of transparency continues in denying the accused a hearing transcript for review in preparation for these procedures and not allowing a transcription to be made without a Court Order while still keeping to a short rigid time frame. This can only be viewed as an intent to prevent the accused any possibility of a fair challenge to their decision. It allows the appeals and penalty phase panels to hear and consider new evidence never mentioned or alluded to in the hearing process without the accused present to combat such testimony. Allowing accuser and accused to give separate statements to the panel also allows for extraneous evidence and fabrication. The accuser herein, in keeping with her penchant for citing diverse published accounts of prosecuted sexual assault cases, testified about Petitioner's past and subsequent transgressions which were not only outright lies but could not have been known to her as she only met him for their seven plus hour sexual escapade and because she already was voluntarily not on campus after his readmission because of the birth of her child by another student. She further testified that Petitioner did these things because his father brought him up to feel "entitled" because of wealth and status. While again a complete fabrication and arguably irrelevant, we have no idea what weight was given these prejudicial, unsupported and not previously recorded fabricated statements by these panels. This is not shocking considering that the tribunal makes fact

finding evidence totally immune from effective cross examination. We don't even know if these panels are given a hearing transcript to review or know anything about the matter they are considering other than what they are spoon fed.[12] While perhaps acceptable by academic standards, such procedure cannot substitute for the constitutionally mandated requirements of due process and fundamental fairness.

After exhausting his administrative remedies, Petitioner again brought an Article 78 proceeding to annul said finding which resulted in the dismissal of his Petition by the New York Supreme Court Appellate Division, Third Department (Appendix B, pgs. App. 5-13). Petitioner filed for leave to appeal to the New York Court of Appeals, the court of last resort, which was denied on March 31, 2020 (Appendix A, pgs. App. 1-4).

The arguments raised at each and every juncture of this process concerned both the evidence submitted and relied upon by Respondents to reach their findings as well as the utter dearth of any meaningful due process protections afforded the

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[12] While the accuser told the appeals and impact panels that she now "remembered" being raped by Petitioner, such testimony was not only wholly inconsistent and contrary to her hearing testimony and "statement" but inconsistent and incompatible with the Board's finding that she was either asleep or temporarily "blacked out" during what they considered to be the relevant triggering portions of the encounter. One cannot "remember" what they were unaware of to begin with.

accused due to Respondents' gross departures from generally accepted procedural protocols and a hearing process devoid of any semblance of an open and fundamentally fair proceeding.

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY FOR THIS COURT TO DETERMINE WHETHER THE DUE PROCESS, EQUAL PROTECTION AND FUNDAMENTAL FAIRNESS GUARANTEES OF THE UNITED STATES CONSTITUTION REQUIRE THAT STUDENT DISCIPLINARY PROCEEDINGS ADJUDGING WHAT WOULD OTHERWISE BE DEEMED CRIMINAL ACTS IN A PUBLIC INSTITUTION PURSUANT TO STATE LAW MANDATES AN ADJUDICATION PROCESS FREE OF POTENTIAL BIAS AND IMPROPER INFLUENCE CONDUCTED IN AN IMPARTIAL MANNER AND ALLOWING THE ACCUSED THE TOOLS NECESSARY TO INSURE A MEANINGFUL OPPORTUNITY TO BE HEARD SO THAT THE ADJUDICATORS ARE EXPOSED TO ALL RELEVANT EVIDENCE AND ISSUES.

It seems inherent in American jurisprudence, that an individual facing serious loss of property or privilege through state action must be given an opportunity to defend himself in an unbiased and impartial tribunal, through a meaningful process that is fundamentally fair, and without regard to his gender. This should not be curtailed by arbitrary classification of the process as "administrative" versus criminal or civil.

Petitioner's case presents the perfect example of the inherent faults of the system, recognized by the US Department of Education but missed by New York in its haste to jump on the political band wagon. Constitutionally mandated principles and concepts of due process and equal protection cannot be ignored or sacrificed for even the best intentions in political expediency or social re-engineering, nor can such change be validated through show trials held in shadow, shielded by confidentiality and clothed in the nobility of protecting an alleged "victim" through the victimization of the accused.

Whatever its stated intent was, the law's proponents and Respondents fail to recognize that the concept of due process must be fluid to be meaningful and provide a level of protection appropriate under the circumstances. While these tribunals may be competent to investigate and adjudicate simple campus infractions or academic related issues, the idea that such legally untrained individuals possess the expertise to adjudicate an accused "responsible" for what otherwise is considered a major felonious crime, labeling and branding them as "rapists" within the academic community and destroying their careers and pursuits is unfathomable, despite the touted legitimacy of the social agenda. While we would not expect that a person charged with rape should be afforded the same protections as someone charged with a parking violation, that is exactly what

Respondent's profess in arguing that these adjudications are mere informal non-adversarial administrative procedures and thus not subject to formal due process protections. Respondents do not deny that the procedures as described herein is factual. They argue essentially that such protections are due process enough because the only "due process" that is due the accused is that which is afforded in their rules whether or not such protections are meaningful or fair under the circumstances or meet the standards of the Constitution, despite the fact that they are not a private entity but are acting under color of state law and are part of the State University of New York. In other terms, how much of a fair hearing is fair enough under "Enough is Enough"?

While Petitioner concedes that the body of law makes it clear that such tribunals are in the nature of administrative proceedings and due process protections may be somewhat limited in comparison to those existing in civil or criminal forums, and further recognizes the Courts have limited the right to unbridled confrontation and cross examination of witnesses in Title IX related hearings to avoid unnecessary trauma, such limitations must still preserve a meaningful right to be heard and allow an accused to present a defense that insures a fundamentally fair adjudication process. This is especially true considering that the courts, as cited by Respondents during this litigation, have concluded

that these tribunals have jurisdiction over incidents that happen off campus, whether school is in session, with non-students and even outside of the country, as long as the accused is an enrolled student at the time of the incident alleged. These tribunals also have jurisdiction over faculty and staff, but the rules controlling their investigative and adjudication process are subject to collective bargaining agreements so that the same forum is using different sets of rules depending on the status of the accused. Its almost unimaginable that any individual would envision that simply enrolling in college would make him subject to the rules and whims of a shadow judiciary procedure concerning actions having no other nexus with the academic environment. The further thought that Constitutional due process protections are unavailing to him in such inquiries is enough to discourage attendance at institutions of higher learning. While New York may pride itself on its "progressive" legal and social agenda, Enough is Enough can only be viewed as progressive if the equal protection of the genders can only be achieved through regressive deprivations of the due process and equal protection protections of males and ironic that convicted felons are given greater due process protections than an otherwise legally innocent individual under its provisions. While such agenda may be political, the "judicial process" systems it created are subject to the due process standards and

principles of the Constitution and within the jurisdiction and oversight of this Court.

In addition, how much deference and leeway should be granted to these tribunals under the circumstances described, especially as the courts appear to be loathe to exercise their oversight authority for fear of substituting their own judgement and still be constitutional when their acts carry the force of law? While the courts have limited some traditionally recognized protections to better serve their stated purpose, they never abandoned the presumption of innocence as specifically recognized by the enabling law, or permitted such tribunals to ignore the plain wording of their enabling law as did Respondents. Nor did any court empower them to shift the burden of proof to establish innocence or the burden of going forward, or make consent an affirmative defense that the accused must prove as Hartman indicates in his final decision. No court ever denied an accused the right to curative or limiting instructions such as negative inferences, or a basic charge to the finders of fact. And no court ever said that a witness can be allowed to pick and choose which questions they consider necessary to answer, when the accuser admittedly waives any special protections afforded her; all of which is indicated by Allen's evidentiary rulings. While Respondents have consistently asked for the deference that would be granted to a properly constituted administrative

agency, they are quick to contend that they should be exempt from critical analysis because they are merely an informal tribunal not subject to the very requirements that they must exhibit to rule with the force of law. [13]

In addition to the fact that the "jury pool" of panel members is an unknown commodity and selected how or trained by whom and in what manner were not sure, without oath or accountability, no party or witness who testifies is bound by any form of oath or other acknowledgment of veracity or credibility. As such, there is absolutely no consequences for failing to tell the truth or even for intentional falsification. Indeed, one case in New York has gone so far as to grant its participants absolute immunity from defamation complaints based on the fact that as a state created administrative adjudication process it carries with it the indicia of sufficient veracity and reliability, and its participants are absolutely immune

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[13] This Court has itself re-examined the *Auer* doctrines of delegation and deference to administrative agency findings. See Justice Scalia in Talk AM, Inc. V. Michigan Bell Tell Co., 564 US50, 68 (2011), questioning the validity of the "American Rule". While such discussions concern duly constituted administrative agencies, the Student Conduct Boards established for reviewing Title IX related sexual conduct accusations are not promulgated or administered by legally trained participants but by lay individuals including teachers, staff and undergraduate students.

from responsibility even for intentional falsehoods. [14] Beyond this, it presents a system that lacks the reliability or integrity necessary to imbue it with the force of law as recognized by the Constitution. If the underlying truth is always in question, then the whole process is based on a false premise.

Perhaps the best evidence that Respondents either have no concept of basic meaningful constitutionally protected due process protections, or show them no deference, or worse yet, show disdain for them can be found in Hartman's own words in his final decision on this matter. His casual dismissal of Petitioner's objections and arguments concerning the selection, composition and training of the Board, his acceptance of the lack of limiting instructions, negative inferences or a jury charge equivalent as being not envisioned in their rules and therefore unnecessary, or *voir dire* or bias inquiries, or the use of competent legal counsel, and the approval of Allen's outrageous evidentiary and procedural rulings insuring that the Board would hear only what Respondents wanted them to hear and insulate witnesses from having to account for inconsistent or fabricated testimony, evidences an institutionalized

[14] See the decision by Justice Randy Sue Marber in Matthew Jacobson v. Kaitlin M. Hunt, rendered January 6, 2020, Index No. 605496/19, Nassau County Supreme Court, New York, indicating that absolute immunity protects the defendant even from intentional fabrication and lies.

method of approach designed to deny an accused a meaningful opportunity to be heard or a fundamentally fair hearing. This is only surpassed by an appeals process designed to perpetuate this disgrace to jurisprudence. Without competent legal guidance or instructions, Respondents act like "jail house lawyers" or pro se litigants who read the law but have no idea how to interpret and apply it, picking and choosing from diverse sections concerning different concepts and stringing them together to justify their preconceived conclusions.

In rejecting Petitioner's due process challenges, the Appellate Division indicated that "...petitioner was afforded adequate notice of the allegations ..... and a meaningful opportunity to be heard at a fair and impartial hearing...." Assuming that the law goes beyond the simple notion of allowing an accused to speak at his hearing, "meaningful" must mean an opportunity to inquire into and explore any relevant issues that might establish his innocence or affect his defense, impeach the testimony or credibility of adverse witnesses, uncover bias or prejudice, predispositions or improper influences and conflicts of interest on behalf of any witness or participant, especially when there appears to be a good faith basis to pursue such inquiry, or any other issues that are material, relevant and probative. He further must be allowed to do this in a open and transparent forum appropriate to the charges against him, administered

by properly trained and qualified personnel with accountability to the impartial and professional fiduciary like position they hold, based on legally sufficient and verifiable evidence by those held accountable in some way for their testimony, with access to the use of appropriate legal counsel and advice to constitute "a fair and impartial hearing". How can an accused have a meaningful opportunity to be heard at a fair and impartial hearing when the tribunal institutionalizes rules that allows for rulings to insure that its hand-picked adjudicators are barred from hearing the whole story? Considering the allegations and the permanent consequences involved herein, anything less is not only a violation of the enabling law but lack the due process protections required by the Constitution.

While any one of these departures from what is considered a required due process protection may be enough to invalidate Respondents' findings and decision, the pattern it suggests is even more disturbing in that it seems to indicate an intentional institutionalized failure to recognize and uphold the aspects of a hearing considered necessary to insure an accused a fundamentally fair proceeding. The cumulative effect of these rulings under the totality of the circumstances described served to deny Petitioner any semblance of a fundamentally fair proceeding. The law is clear that due process must be meaningful in that the mere protections and words on paper must

be translated into the accused's protected rights in reality. The Department of Education recognized the shortcomings of its original regulations only after subjecting numerous accused young men to its abuses. Respondents appear to believe that despite this, it will achieve its social goals in any manner possible, even if it means the denial of due process and equal protection rights to a segment of its population and the total disregard of the law and even its own promulgated rules.

The law is well established that a fundamental tenet of due process is a fair and impartial tribunal, Marshall v. Jerrico, Inc., 440 U.S. 238 (1980). The Due Process guarantees of the United States Constitution assures every litigant, civil or criminal, of a trial by an impartial court, free of bias or the appearance of bias. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); Tumey v. Ohio , 273 U.S. 510, 532 (1927). There is no rational that would exempt administrative proceedings, especially those dealing with such serious and complex issues as sexual consent from the requirement of such protections. Similarly, "A fair trial in a fair tribunal is a basic requirement of due process." In Re Murchison, 349 U.S. 133 (1955). In its discussion, the Court considered the question of actual bias and the requirement that such adjudicators do their best to weigh the scales of justice between contending parties. Considering the circumstances described herein, can

Respondents reasonably argue that their procedure is designed to insure that?

While Respondents contend that the mere appearance of impropriety is insufficient to disturb the Board's findings, the courts do not agree. "The protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." Potashnick v Port City Constr. Co., 609 F.2d 1102, 1111 (5th Cir.) (1980) (quoting United States v Columbia Broadcasting Sys., Inc. 497 F. 2d 107, 109 (5th Cir. 1974); see also Liljeberg v.Health Serv. Acquistion Corp., 486 U.S. 847, (1988), ("it is critically important.....to identify the facts that might reasonably cause an objective observer to question {a judge"s} impartiality)). The "appearance of impartiality is virtually as important" to the smooth functioning of a fair judicial system as is the fact of impartiality. Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir.) (1977). See also Justice Harlan's concurrence in Mayberry v Pennsylvania, 400 U.S. 455, 469 (1971); Brecht v. Abrahamson, 507 U.S. 619 (1993); Williams v Taylor, 529 U.S. 362 (2000). As Respondents are state actors ruling with the force of the law, it should be irrelevant whether we call the procedure a "trial" or a "hearing, and the adjudicators "judges" or "facilitators" or "panel members", and the tribunal civil, criminal or administrative as they are all part of the state mandated "judicial process".

Respondents claim that while they should be given the deference reserved for legitimate tribunals, they should be spared the duties and requirements that go with it. Perhaps these academicians should read the Model Code of Judicial Conduct Canons, as cited in Murchinson, also stating "any question of a judge's impartiality threatens the purity of the judicial process and its institutions", so that any of the described appearances of impropriety violate state and Federal constitutional due process rights because the integrity and independence of the judicial system must maintain and enforce high standards of conduct to promote public confidence. See also Porter v. Singletary, 49 F. 3d 1489, (11th Cir.) (1995). . Such concepts exist at both fact finding, and penalty phases and into the review system. See Gardner v Florida, 430 U.S. 349, (1977), Tumey v. Ohio, 273 U.S. 510, (1927), and Chapman v. California, 386 U.S. 18, (1967). New York recognizes as well the due process right to an impartial jurist. In Peo. V. Novak, NY Slip Op (2017), the Court of Appeals, citing New York Regulation 22 NYCRR 100.2, indicated that a judge must not only be actually neutral, but must appear so as well to insure public confidence in the justice system in that an unconstitutional potential for bias is a "clear abrogation", and "an appearance of impropriety" conflicts with the notion of "fundamental fairness". Should Respondents' contention that this forum is merely an administrative proceeding, under

these circumstances described, be allowed to vitiate such concepts?

Numerous due process concerns raised herein have been considered by various courts and it is clear that the tide has turned regarding what is considered fundamentally fair in student disciplinary proceedings, especially as regards alleged sexual misconduct. Detailed notice of charges and specifications are required once a formal process begins, Starishevsky v Hofstra University, 161 Misc. 2d 137 (Suffolk County Supreme Court, (1997). As the single investigator model includes the inherent and inescapable risk of bias with no checks and balances, live hearings will allow a proper forum for cross examination to fully assess credibility, Prasad v. Cornell University, 2016 WL 3212079 (N.D.N.Y) (2016); Doe v. Brandeis University, 177 F. Supp. 3d 561 (D. Mass.) (2016).

As Justice Scalia said in his dissent in Maryland v. Craig, 497 U.S. 836 (1990), a case involving the alleged sexual abuse of a child, "virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones". The right to some form of cross examination is the cornerstone of "basic fairness" especially in sexual assault disciplinary cases that turn on the issue of credibility, Starishevesky v Hofstra, Doe v. Baum, 903 F.3d 575 (6th Cir.) (2018), Doe v. The University of Southern Mississippi, No.

2:18-cv-0015-KS-MTP (S.D. Miss.) (2018), J. Lee v. The University of New Mexico, et. al., No. CIV 17-1230 JB/LF (D.N.M.) (2018), Doe v. Regents of Univ. of Cal., 28 Cal. App. 5th 44 (2d Dist.) (2018). The Sixth Circuit, in Doe v. Baum et. al. 903 F 3d. 578 (2020), in reaffirming this for these types of cases, provides an excellent history and overview of the subject. The Seventh Circuit, in Doe v Purdue University, 928 F.3d 652, (2019), also reaffirmed the protected due process rights of an accused in such tribunals as well as granting the Petitioner therein further review concerning the equal protection and anti-male bias claims as a possible violation of Title IX in itself. (Petitioner notes that as the court's confirm that cross examination is necessary especially in sexual misconduct related inquiries where credibility is in issue, the Board in this matter stated in their decision that they considered the credibility of the parties and found the accuser more credible than him. Petitioner always maintained that credibility was never an issue as the physical acts she so graphically described were all consensual and did take place, but that a plain reading of her "complaint" confirmed consent and that no violation of law took place. If however, the Board did rest any conclusions on credibility, then allowing a witness to decline any question at will or barring any relevant questions regarding inconsistent statements, bias, etc., as irrelevant vitiates the concept of confrontation and cross examination.)

Courts have also recognized that an accused's rights might differ depending on whether he attends a private or public university as the private institution does not afford the "full panoply" of due process rights and indicating the old doctrine that a university is free to handle its procedure in any way it wished as long as it adheres to its published rules does not extend to public universities, Bondalapati v. Columbia University, et. al, 170 A.D. 3d 489 (2019), (NY), Cavanagh v. Cathedral Preparatory Seminary, 284 A.D. 2d 360 (2001), (NY), Matter of Mu Ch. Of Delta Kappa Epsilon v. Colgate Univ., 176 A.D.2d 11 (1992), (NY). That "no tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important element protected by the Due Process Clause of the Fourteenth Amendment', Goss v. Lopez, 419 U.S. 565, 574, 576 (1975), is clearly accepted by the courts, Alsup v. Nw. Shoals Cmty.Coll., 3:15-cv-00248-CLS (N.D. Ala.) (2016), Waugh v. Nev. State Bd. of Cosmetology, 36 F.Supp. 3d 991 (D. Nev.) (2014).

Respondent's procedure exhibits not merely a failure to comprehend these basic due process concerns in one case, but institutionalize a defective and repugnant system as standard operating procedure. While these procedures may be conducted in shadow and hidden from the public, their very existence is a threat to the entire judicial system. The due process and equal protection protections of the

Constitution may have been created to protect individuals, but the continued integrity of the judicial system are equally dependent on their protections to insure the public confidence necessary in a democratic society. In this case, these constitutional deprivations led to an "erroneous outcome" which is a substantive due process violation in itself especially as Petitioner, by any reasonable and fair review of the "evidence", is actually innocent. How many others have and will make the same claim? Our fundamental right to education as protected by the due process, equal protection and privileges and immunities clauses of the Constitution must be upheld by this Court to insure faith and confidence in all our justice systems.

CONCLUSION

For the reasons set forth above, this Court should grant the instant petition and issue a writ of certiorari to the New York State Court of Appeals Respectfully submitted on this 15th day of June, 2020.

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