

No. _____

**In The
Supreme Court of the United States**

————— ♦ —————

**DR. ORIEN L. TULP, PRESIDENT OF THE
UNIVERSITY OF SCIENCE, ARTS, AND
TECHNOLOGY,**
Petitioner,

v.

**EDUCATIONAL COMMISSION FOR FOREIGN
MEDICAL GRADUATES; DR. WILLIAM W.
PINSKY, PRESIDENT AND CEO, EDUCATIONAL
COMMISSION FOR FOREIGN
MEDICAL GRADUATES,**
Respondents.

————— ♦ —————

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

————— ♦ —————

PETITION FOR WRIT OF CERTIORARI

————— ♦ —————

**Tommy Swate
Counsel of Record
SWATE LAW
403 Wild Plum
Houston, Texas 77013
(713) 377-4860
swatemd@aol.com**

Counsel for Petitioner

Dated: January 14, 2021

QUESTIONS PRESENTED

1. Did the lower Court fail to adhere to the axiom that in ruling on a motion for summary judgment “the evidence of the non-movant is to be believed and all justifiable inferences are drawn in his favor”?
2. Did the lower Court violate its function at summary judgment by weighting the evidence and determine the truth of the matter instead of determining whether there was a genuine issue for trial?
3. Did the lower Court’s opinion reflect a clear misapprehension of summary judgment standards in light of this Court’s precedent in Tolan v. Cotton, 572 U.S. 650, 660 (2014)?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties.

STATEMENT OF RELATED CASES

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the relationships of all the parties to institutions involved in petition

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
STATEMENT OF RELATED CASES	ii
CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES	iv
CITATIONS OF OPINIONS	1
STATEMENT OF THE BASIS FOR JURISDICTION.....	1
WRIT'S IMPORTANCE	1
CONSTITUTIONAL PROVISIONS AND STATUTES	None cited
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	14

APPENDIX:

Unpublished Opinion and Judgment of
The United States Court of Appeals
For the Third Circuit
entered August 17, 2020 1a

Memorandum Opinion of
The United States District Court
For the Eastern District of Pennsylvania
entered June 25, 2019 11a

Order of
The United States District Court
For the Eastern District of Pennsylvania
Re: Granting Defendant Education
Commission for Foreign Medical
Graduates' Motion for Summary Judgment
entered June 25, 2019..... 33a

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144 (1970)	11
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248 106 S. Ct. 2505 (1986)	14
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965)	8
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004)	10
<i>Celotex Corp v. Cartarett</i> , 477 U.S. 317 (1986)	13
<i>Psi Upsilon of Phila v. Univ of Pa.</i> , 591 A 2d 755 (Pa. Super. 1991)	11
<i>Sch. Dist. Of City of Harrisburg v. Pennsylvania Interscholastic Athletics Association</i> , 309 A. 2d 353 (Pa 1973)	3, 8
<i>Simer v. Rios</i> , 661 F.2d 655 (7th Cir. 1981)	12
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014)	1, 9, 14

STATUTE

28 U.S.C § 1254(1)	1
--------------------------	---

RULE

Fed. R. Civ. P. 56(a)	9
-----------------------------	---

OTHER AUTHORITY

World Directory of Medical Schools (https://search.wdoms.org/home/SchoolDetail/ F0000836)	2
--	---

CITATIONS OF OPINIONS

The case was appealed from the United States District Court for the Eastern District of Pennsylvania No 2-18-cv-05540 to United States of Appeals for the Third Circuit No. 19-2706. The United States of Appeals for the Third Circuit in issued it Judgment on 08/17/2020 1a.

STATEMENT OF THE BASIS FOR JURISDICTION

The Judgement of the Court of Appeals was entered on August 17, 2020. The Court's jurisdiction rests on 28 U.S.C. section 1254(1)

WRIT'S IMPORTANCE

Due process dictates that all Courts must operate under a clearly defined set of standards in granting summary case disposition. The Lower Court blatantly ignored this Court's ruling in *Tolan v. Cotton* that established summary judgment evidence standards. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). In violation of the ruling in *Tolan v. Cotton* the Lower Court granted Movant summary motion despite Movant's due process violation admissions. This case is important to this Country's jurisprudence because of the need for all Circuits to follow uniform summary case deposition standards when litigants are threatened with having their rights to a jury trial denied.

STATEMENT OF THE CASE

The University of Science, Arts, and Technology (USAT) is a medical school licensed by Monserrat, A British Protectorate in the Caribbean. SAppx 0061-0065 Upon graduation the majority of

the graduates seek post graduate medical training (residency) in the United States. In order to be considered eligible for post graduate medical training in the United States the graduates have to be certified by the Educational Commission for Foreign Medical Graduates (“ECFMG”). SAppx. 0088-0089

The World Directory of Medical Schools is a web site used by future or current medical students to determine if credits from foreign medical schools are acceptable to the ECFMG. SAppx 0223

On or about September 28, 2018, Dr. Tulp, President of USAT discovered that the ECFMG had posted negative and prejudicial information on a web site, World Directory of Medical Schools (<https://search.wdoms.org/home/SchoolDetail/F0000836>), regarding USAT College of Medicine. SAppx 744

The information was posted by ECFMG, a private organization that certifies foreign medical students (“FMG”) and international medical graduates (“IMG”). SAppx 147 An ECFMG certification is required for a FMG or an IMG to obtain a residency position in a United States Medical Residency program. A FMG or an IMG is required to obtain ECFMG certification in order to obtain a U. S. medical training position (residency). The ECFMG acts as a gatekeeper for entry into the United States health training system.

Any action by a student or any other person that may interfere with the ECFMG credentialing process can be labeled “Irregular behavior”. The ECFMG by its own rules gives a person charged with “irregular behavior” a right to due process and Pennsylvania also imposes a due process right on a private organization when the private association has

deprived a member or prospective member of substantial economic or provisional advantage. *Sch. Dist. Of City of Harrisburg v. Pennsylvania Interscholastic Athletics Association*, 309 A. 2d 353, 357 (Pa 1973).

On September 14, 2018, The ECFMG placed a negative prejudicial sponsor Note in the World Directory of Medical School. S Appx. 745 The World Directory of Medical Schools web site informs potential and present students whether graduates from USAT are eligible to apply for an ECFMG certificate. The notice was a warning to future and/or current students that USAT credits might not be acceptable to the ECFMG. S Appx 0223-0224 An additional negative note was published on the website on October 18, 2020. The ECFMG published the negative information prior to giving Dr. Tulp (Non-movant) notice regarding the charges alleged in the negative sponsor note. SAppox 753-754 The note equated to an allegation Dr. Tulp had engaged in “irregular behavior” by holding USAT classes in the United States.

The ECFMG in its brief (SAppx 0223-0224) made the following admissions:

1. The ECFMG placed a sponsor note in the World Directory of Medical Schools to inform USAT students and USAT graduates regarding their eligibility to apply for Movant’s (ECFMG) certificate. SAppx 778
2. On or around September 14, 2018, The ECFMG (Movant) updated its Sponsor Note for USAT with prejudicial negative information. SAppx 778

3. The ECFMG (Movant) updated its Sponsor Note for USAT again on or about October 18th with prejudicial negative information. SAppx 778
4. The ECFMG (Movant) sent a letter summarizing and describing in detail the allegations of “irregular behavior” on October 18, 2018, after publishing negative information on the Internet. SAppx 778
5. The ECFMG (Movant) published the September 24th and October 18th Sponsor Notes without giving Dr. Tulp (Non-Movant) the right to dispute the “irregular behavior” prejudicial allegations. SAppx 0804
6. The ECFMG (Movant) admitted that it imposed a limited sanction on Non-Movant without notice or hearing. SAppx 845

The decision to post the derogatory information was made by the ECFMG (Movant) prior to any notice or hearing regarding the ECFMG’s allegations against USAT and Dr. Tulp (Non-Movant). ECFMG (Movant) posted the information in spite of the fact that, prior to making a negative determination, ECFMG granted any person or entity the right to notice and a hearing. In order for ECFMG (Movant) to make a determination of “Irregular behavior” ECFMG’s rules required ECFMG to present evidence to the ECFMG’s Credentials Committee (“MECC”). The MECC is commanded by ECFMG’s rules to base a determination of “irregular behavior” on a preponderance of evidence presented to the MECC. SAppx 0203

An ECFMG's Credentials Committee hearing was scheduled for November 28, 2018 to hear the ECFMG's "irregular behavior" allegations against Dr. Tulp. "Irregular behavior" is defined as "all actions or attempted acts on part of applicants or any other person that would or could subvert the examination, certificate or other processes, programs or actions of The ECFMG" SAppx 200. The hearing was conducted by the ECFMG's litigation attorney acting as the MECC chairperson.

At the start of the November 28th MECC hearing, the ECFMG was asked by Dr. Tulp's attorney what specific allegations were being made against Dr. Tulp. The ECFMG's litigation attorney refused to reveal the specific allegations to the committee in an open committee hearing. The ECFMG's litigation attorney insisted that Dr. Tulp answer questions posed by the MECC's individual members prior to knowing what specific charges and evidence the Credentials Committee (MECC) were to consider and the evidence the MECC had reviewed prior to the hearing. Dr. Tulp (Non-Movant) was given only the right of allocution.

The ECFMG's litigation Attorney acting as MECC chairperson was asked to tell Dr. Tulp what evidence had been given to the MECC prior to the hearing. She was also asked to supply Dr. Tulp with copies of the communication between ECFMG's staff and the MECC regarding the charge of "irregular behavior". The ECFMG's chairperson refused to supply Dr. Tulp with the requested information. The ECFMG's litigation attorney acting as chairman, refused to tell the MECC what the specific "irregular behavior" allegation was, or what evidence supported the ECFMG's claim of "irregular behavior".

The ECFMG's litigation attorney had given Dr. Tulp's attorney, immediately prior to the hearing as he entered the hearing room, two large black notebooks of alleged evidence. This information was claimed supplied to the Credentials Committee (MECC) individual members prior to the November 28th hearing, but not given to Dr. Tulp until immediately prior to the November 28th hearing. SAppx 0447, 0469

Dr. Tulp's attorney instructed Dr. Tulp not to testify until the evidence against him were stated to the MECC as a body. SAppx 799 The ECFMG's litigation attorney acting as prosecutor refused to place in the hearing records any "irregular behavior" evidence. SAppox 769, Instead the ECFMG's litigation attorney insisted that Dr. Tulp respond to questions before the MECC prior to alleged "irregular behavior" evidence being disclosed to the MECC members setting as a body. Dr. Tulp was only given the right of allocution.

When Dr. Tulp's attorney opened the two large black evidence notebook given to him when he sat down in the room to start the November 28th MECC hearing, Dr. Tulp's attorney pointed out to the MECC that the notebooks contained evidence of an unknown person, the ECFMG's litigation attorney acting as MECC committee chair immediately adjourned the meeting prior to any evidence being present by either the ECFMG or Dr. Tulp. SAppx. 789 This action alone should create a material fact issue.

The ECFMG's litigation Attorney controlled the hearing. The ECFMG's litigation attorney refused

to put any evidence in to the hearing record. SAppx 789 The hearing evidence record is virtually a blank slate.

The MECC was required by ECFMG policy to determine if “irregular behavior” had occurred based on the preponderance of the evidence presented to the MECC. SAppx 0203 No evidence or specific allegations were presented to the MECC during the November hearing. SAppx. 0789 Without hearing specific allegations or evidence as a body, the MECC voted to find that Dr. Tulp had engaged in “irregular behavior”. The accusers, acting as the adjudicators, voted on the undisclosed specific “irregular behavior” allegations based on undisclosed evidence. SAppx 0369

The ECFMG (Movant) by its own admissions established material factual issues. SAppx. 845 The ECFMG’s (Movant) in its appendix attached to its Lower Court’s (District Court) brief claimed the following facts were undisputed:

1. Committee is required to make a decision based on preponderance of evidence before committee. SAppx 0203
2. No evidence was presented at the November 28 hearing. SAppx 789
3. By a preponderance of the evidence the decision of “irregular behavior” is required to be based on evidence presented to the Credentials Committee at the November 28th hearing SAppx 203

4. The November 28th proceeding was only to give Dr. Tulp an opportunity to make a statement on his behalf. SAppx 203
5. The ECFMG acted prior to November 28 hearing. SAppx 0332
6. The ECFMG posted a derogatory notice in mid-September SAppx 0350
7. New evidence was given to Dr. Tulp seconds before the November 28th hearing started. SAppx 0447, 0469

The Third Court of Appeals admitted that the ECFMG (Movant) owed Dr. Tulp a duty of common law due process. *Sch. Dist. Of City of Harrisburg v. Pennsylvania Interscholastic Athletics Association*, 309 A. 2d 353, 357 (Pa 1973). More importantly the ECFMG (Movant) gave Dr. Tulp (Non-Movant) the right to a hearing with the hearing decision based on a preponderance of evidence heard by the MECC. Both a duty of common law process and a contractual due process duty require that fundamental due process requirements be met by the opportunity to be heard “at a meaningful time and in a meaningful matter”. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

The ECFMG produced no witnesses and no evidence during the November 28th MECC hearing. No evidence was submitted to the MECC setting as a body on November 28th. The ECFMG litigation attorney adjourned the hearing prior to presenting or hearing any evidence.

The Lower Court found no due process violation in the record by finding that Dr. Tulp (Non-Movant) raised no genuine material fact issue as to

whether he was heard in a meaningful manner. The Lower Court's findings were made in the face of "undisputed" facts supporting Dr. Tulp's (Non-Movant) claims by the Lower Court weighting the evidence in ECFMG's (Movant) favor. SAppx 845

REASONS FOR GRANTING THE WRIT

A factual dispute exists as to whether Dr. Tulp (Non-movant) was given the opportunity to be heard at a meaningful time and in a meaningful manner prior to the ECFMG (Movant) posting the derogatory information on the internet. The Lower Court erred when it failed to address Dr. Tulp's (Non-movant) material evidence that he was not given notice and hearing prior to the ECFMG (Movant) posting "irregular behavior" claims on the internet prior to the November 28th hearing. The ECFMG (Movant) by its own admission established a material fact issue that Dr. Tulp was denied due process prior to the November 28th hearing. SAppx 845

This Court has established the standard for granting of Summary Judgement in *Tolan v. Cotton*. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). The standard as outlined in *Tolan* is:

"Summary Judgment is appropriate only if the 'Movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.' F.R.C.P. 56(a). In making that determination, a court must view the evidence 'in light most favorable to the opposing party'".

The Lower Courts erred in weighing the evidence in the light most favorable to the ECFMG (Movant) by ignoring "undisputed facts" that were not favorable to Movant. The Lower Court erred in that

the “judge’s function” at summary judgement is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Brosseau v. Haugen*, 543 U.S. 194, 195, n 2 (2004) (per curium)

The Lower Court ignored facts established by ECFMG’s “undisputed facts” listed below that no notice or hearing had been given to Dr. Tulp prior to the ECFMG posting derogatory website information. The ECFMG action created a fact issue over whether Dr. Tulp’s was given due process. SAppx 845

The ECFMG (Movant), by its own admissions, created material fact issues as to whether Dr. Tulp, (Non-Movant), received due process by the following admissions:

1. The ECFMG placed a sponsor Note in the World Directory of Medical Schools to inform students specifically whether graduates were eligible to apply for Movant’s certificate.
2. On or around September 14, 2018, The ECFMG updated its Sponsor Notes for USAT with negative information, SAppx778
3. The ECFMG updated its Sponsor Notes for USAT again on or about October 18th with negative information, SAppx 778
4. The ECFMG(Movant) sent Dr. Tulp a letter summarizing and describing the allegations of “Irregular behavior” on October 18, 2018, day after publishing additional injurious negative information on the Internet. SAppx 778
5. The ECFMG (Movant) published the September 24th and October 18th Sponsor

Notes without giving Non-Movant Notice of Hearing. SAppx 845

6. The ECFMG (Movant) admitted to sanctioning Non-Movant prior to the November 28th hearing. SAppx 845

As a result of the internet posting, there is a factual dispute as to whether Dr. Tulp's (Non-Movant) rights to notice and a fair hearing were violated. SAppx 845 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A material fact dispute exists as to whether the ECFMG (Movant) followed the “procedural safeguards which it specifically provided prior to posting derogatory material on the internet. *Psi Upsilon of Phila v. Univ of Pa.*, 591 A 2d 755, 758 (Pa. Super. 1991). Specifically, any irregular behavior finding is to be determined by the MECC after meeting as a committee with the decision based on the preponderance of the evidence before the committee SAppx 0203.

A disputed fact issue exists as to whether Dr. Tulp (Non-Movant) received due process in the November 28th MECC hearing. The ECFMG's (Movant) own “undisputed” material facts are listed below:

1. The MECC is required to make a “irregular behavior” finding based on preponderance of evidence before the committee meeting as a body. SAppx 768
2. No evidence was presented at the November 28 MECC hearing. SAppx 769
3. The ECFMG acted prior to the November 28th hearing. SAppx 845.

4. New evidence was given to Dr. Tulp (Non-Movant) seconds before the November 28th MECC hearing. SAppx 765
5. The November 28th hearing was adjourned when Dr. Tulp's attorney started to put evidence into the record. SAppx 0397

The summary decision by the Lower Court was that there were no material factual disputes as to violations of Dr. Tulp (Non-Movant) due process rights. To reach the conclusion that Dr. Tulp had no material factual disputes, the Lower Court had to ignore ECFMG's "undisputed facts". Dr. Tulp (Non-Movant) was constructively excluded from portions of the Credential Committee evidentiary proceedings when evidence was withheld from him but supplied to the Credential Committee members. The Appellate Court in its decision used evidence not supplied to Dr. Tulp to make its decision. S. App. 208, 403

ECFMG's (Movant) action of withholding material evidence from Dr. Tulp (Non-Movant) is per se denial of fundamental due process. Over three hundred student affidavits were withheld from Dr. Tulp's (Non-Movant). SAppx 0010 The ex parte evidence was not made part of the hearing record. The failure to disclose the ex parte evidence prejudiced Dr. Tulp (Non-Movant) ability to respond to the undisclosed evidence in a meaningful manner. *Simer v. Rios*, 661 F.2d 655, 680.

The Third Circuit referenced evidence that was not disclosed to Dr. Tulp (Non-movant). Furthermore, such evidence was not made a part of the November 28th MCEE hearing record. Ex parte evidence taken in the Non-movant's absence violates the very foundation of a fair hearing. A fundamental rule of

fairness is no evidence should be used against a person which has not be brought to his attention. Whether Dr. Tulp was denied fundamental due process by the use of ex parte evidence is a factual issue to be resolved by a fact finder.

When Dr. Tulp's attorney pointed out to the ECFMG's litigation attorney chairperson that evidence was being considered that had not been disclosed, the chairperson rapidly adjourned the Medical Education Credentials Committee (MECC) meeting. SAppx 0397

Summary judgement is appropriate only if there is no genuine issue of material fact such that a reasonable fact finder could find for the non-moving party. *Celotex Corp v. Cartarett*, 477 U.S. 317. At least three disputed material facts preclude the granting of summary judgment. The first disputed material facts set is whether Dr. Tulp's (Non-movant) received notice and an opportunity to be heard prior to the ECFMG's (Movant) posting derogatory information on the internet. The second disputed material fact set is whether Dr. Tulp was given notice of irregular behavior charges and had a meaningful opportunity to be heard during the November 28th MECC hearing. The third disputed material facts set is whether the ex parte evidence considered by the Credential Committee (MECC) which was not disclosed in the hearing or made part of the record prejudiced Dr. Tulp ability to respond to the ECFMG (Movant) "irregular behavior" charges in a meaningful manner.

By weighing the evidence and reaching factual inferences contrary to the undisputed competent evidence, the Lower Court failed to follow this Court's

instructions on deciding summary judgment matters. The Lower Court never addressed ECFMG(Movant) posting of derogatory prejudicial internet information prior to a hearing or notice. The internet posting prior to any notice or hearing is admitted as a “minor” violation by the Movant. The Lower Court ignored this Court’s instructions articulated in *Talon v. Cotton*. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014).

Material factual disputes exist as to whether it was fair or legal that Dr. Tulp(Non-Movant) should be required by the ECFMG(Movant) to rebut evidence that was never presented at the November 28th hearing charging “irregular behavior”. The Lower Court refused to draw a reasonable inference that a material fact dispute existed as to whether Dr. Tulp was denied due process. The Lower Court failed to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in Non-Movant’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S. Ct. 2505 (1986).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Tommy Swate
Counsel of Record
SWATE LAW
403 Wild Plum
Houston, Texas 77013
713-377-4860
Swatemd@aol.com

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Unpublished Opinion and Judgment of The United States Court of Appeals For the Third Circuit entered August 17, 2020	1a
Memorandum Opinion of The United States District Court For the Eastern District of Pennsylvania entered June 25, 2019.....	11a
Order of The United States District Court For the Eastern District of Pennsylvania Re: Granting Defendant Education Commission for Foreign Medical Graduates' Motion for Summary Judgment entered June 25, 2019.....	33a

1a

[ENTERED: August 17, 2020]

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2706

DR. ORIEN L. TULP, PRESIDENT OF THE
UNIVERSITY OF SCIENCE, ARTS, AND
TECHNOLOGY,

Appellant

v.

EDUCATIONAL COMMISSION FOR
FOREIGN MEDICAL GRADUATES;
DR. WILLIAM W. PINSKY, PRESIDENT AND
CEO, EDUCATIONAL COMMISSION FOR
FOREIGN MEDICAL GRADUATES

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-18-cv-05540)
District Judge: Hon. Wendy Beetlestone

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
May 19, 2020

Before: McKEE, BIBAS, and COWEN,
Circuit Judges

(Opinion filed: August 17, 2020)

OPINION*

McKEE, *Circuit Judge*.

Dr. Orien Tulp is president of the University of Science, Arts, and Technology, a medical school ostensibly located in Montserrat, a volcanic isle in the British Virgin Islands. Tulp claims his due process rights were violated by the Education Commission for Foreign Medical Graduates. The district court granted summary judgment for ECFMG. Because we find the record completely belies Tulp's claims, we will affirm.

I.

First, a jurisdictional note. For cases that were originally filed in federal court, the bar for dismissal for failure to meet the amount-in-controversy requirement is high: "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."¹ When this suit was initially filed, jurisdiction was based on federal question jurisdiction due to the § 1983 claim.² The complaint also alleged diversity jurisdiction because the parties were diverse. But, on appeal, after the uncontested dismissal of the § 1983 claim, Tulp's

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

¹ *Suber v. Chrysler Corp.*, 104 F.3d 578, 583 (3d Cir. 1997), *as amended* (Feb. 18, 1997) (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938)) (emphasis omitted).

² 28 U.S.C. § 1331.

only remaining ground for jurisdiction is diversity. However, he has never pled an amount in controversy.

Although jurisdiction is not contested by the parties, we nevertheless have an independent responsibility to consider it and to dismiss when it is lacking.³ Tulp did not earn a salary from his work at USAT, and he testified to never having earned money from USAT.⁴ When pressed to describe his damages, Tulp provided unsubstantiated figures showing substantial declines in enrollment for USAT.⁵ However, Tulp did not bother to supply the court with any information about the monetary impact of those enrollment changes. Since Tulp owns a 50% ownership stake in the school, we can presume that such enrollment losses (assuming the school netted money per student enrolled) will eventually harm him financially. The extent of that financial impact is unclear, and it is neither practical nor appropriate for us to attempt to quantify these claims. Nevertheless, given the number of students involved and the scope of USAT's activities, we cannot conclude to a legal certainty that Tulp does not satisfy the \$75,000 jurisdictional limit. Therefore, although the precise

³ “[A]n objection to subject matter jurisdiction may be raised at any time, a court may raise jurisdictional issues *sua sponte*, and a court may consider evidence beyond the pleadings such as testimony and depositions when considering a jurisdictional challenge.” *Group Against Smog and Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 122 n.6 (3d Cir. 2016) (citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011); *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997)).

⁴ S. App. at 205, 747–49.

⁵ S. App. at 913-15.

amount of damages remains doubtful, we conclude that we do have subject matter jurisdiction and will proceed to consider Tulp's state law due process claims.⁶ After doing so, we have no doubt that they are meritless.

Given this is a non-precedential opinion, we would normally only briefly state the procedural history and the underlying facts, if at all. However, it is impossible to appreciate the "flavor" of this dispute without mentioning in greater detail some of what has transpired to get us here. Moreover, much of the conduct that we summarize falls far below the minimum standards we expect of seasoned attorneys, and we will not let the conduct pass without comment. Thus, we begin with the fabled inquiry of Justice Frankfurter: How did we get here?⁷

A.

Tulp's school, and all other foreign medical schools, require certification from the ECFMG as a condition of their graduates being eligible to apply for medical residencies in the United States. In 2018, ECFMG began receiving reports that Tulp's school was offering medical school classes *within* the United States. This would violate its status as a foreign medical school. ECFMG started an investigation.

It sent affidavits to USAT students asking where their medical training had taken place. More than 300 students responded that classes had been offered in different locations within the United States.

⁶ We have jurisdiction to do so under 28 U.S.C. § 1291.

⁷ RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT, 149 (1st ed. 1992).

Not a single respondent reported receiving a complete medical education in Montserrat.⁸ These responses also revealed further discrepancies in the data USAT had provided to become certified.

ECFMG informed Tulp of their suspicions and invited him to attend their credentials committee meeting in Philadelphia on November 28, 2018.⁹ It turned out to be a most memorable encounter. At that meeting, Tulp’s attorney refused to provide any information or to cooperate in any way. Rather than cooperating with ECFMG, Tulp’s attorney accused ECFMG of “blackmailing” USAT students by questioning the school’s truthfulness, threatened the individual committee members with personal liability (“everybody in this room is going to be liable”¹⁰), demanded to be told the name of the security guard stationed outside the conference room,¹¹ and even insisted that ECFMG justify its investigation rather than offering any defense of Tulp’s behavior. The attorney stated, “Dr. Tulp is not going to be talking today. The next time you hear him talk is going to be in federal court.”¹²

Soon enough, Tulp filed suit against ECFMG with a rambling complaint that appeared to make a number of allegations: “(1) common law tortious interference with contract against ECFMG; (2) a claim pursuant to 42 U.S.C. § 1983 against ECFMG

⁸ S. App. 208, 403.

⁹ S. App. 075.

¹⁰ S. App. 380.

¹¹ *Id.* at 373.

¹² *Id.* at 386.

for violating Plaintiff's procedural due process rights as protected by the Fourteenth Amendment; (3) violation of common law due process against ECFMG; (4) common law fraud against ECFMG; (5) common law abuse of process against ECFMG; (6) common law negligent misrepresentation against ECFMG; and, (7) a claim pursuant to 42 U.S.C. § 1983 against both Defendants for violating Plaintiff's procedural and substantive due process rights as protected by the Fourteenth Amendment.”¹³

The district court dismissed every count except the common law due process allegation against ECFMG based on Pennsylvania state law. Ultimately, the district court granted summary judgment to ECFMG on that count as well and this appeal followed.

Summary judgment is appropriate when there is no genuine issue of material fact.¹⁴ A particular issue of fact is genuine if a reasonable jury could return a verdict for the non-moving party, and it is material if it would affect the outcome.¹⁵

B.

Appellees argue that ECFMG owed Tulp no duty of common law due process at all. Pennsylvania imposes a due process right on a private organization “only under limited circumstances, as where the private association has deprived a member or

¹³ *Tulp v. Educ. Comm’n for Foreign Med. Graduates*, 376 F. Supp. 3d 531, 538 (E.D. Pa. 2019).

¹⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

prospective member of substantial economic or professional advantages . . .”¹⁶ Arguably those conditions are satisfied here, although we note that ECFMG’s disciplinary actions were against Dr. Tulp personally and did not prevent USAT from operating or prevent Tulp from teaching there or elsewhere.

More importantly, the Pennsylvania Supreme Court cautions us that “[c]ourts should not interfere with internal procedure and discipline unless real prejudice, bias or denial of due process is present.”¹⁷ No such prejudice or unfairness of any sort existed here. Instead, the behavior of Tulip’s attorney before the ECFMG committee’s inquiry can best be described as a waste of time characterized by unprofessional grandstanding and legal obfuscation. Tulp received notice of the hearing, was allowed to attend with counsel, and was repeatedly invited to offer evidence in his own defense. He deliberately refused to do so. Any resultant loss of an opportunity to be heard rests squarely with Tulp and his counsel, not ECFMG, and Tulp’s argument to the contrary is frivolous. There is simply no due process violation on this record.

Tulp further argues that he should have received more opportunities to be heard, and that ECFMG’s public notice of their inquiry—which damaged USAT’s reputation before the hearing even took place—were separate violations. The district court considered and dismissed those claims. Tulp has

¹⁶ *Sch. Dist. of City of Harrisburg v. Pennsylvania Interscholastic Athletic Ass’n*, 309 A.2d 353, 357 (Pa. 1973).

¹⁷ *Psi Upsilon of Philadelphia v. Univ. of Pennsylvania*, 591 A.2d 755, 760 (Pa. Super. Ct. 1991).

presented nothing that would raise a genuine issue of material fact and we therefore conclude that the district court correctly awarded summary judgment to ECFMG on both claims.¹⁸

III.

For these reasons, we will affirm the district court's order granting summary judgment to ECFMG.

¹⁸ Far from presenting disputed facts, Tulp's brief contains demonstrably inaccurate allegations. It suggests, for instance, that ECFMG's hearing was "a sham" that lacked "any evidence in the administrative record." Appellant's Br. at 12. Such statements are directly contradicted by the transcript of that proceeding and exceed the bounds of zealous advocacy.

9a

[ENTERED: August 17, 2020]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2706

DR. ORIEN L. TULP, PRESIDENT OF THE
UNIVERSITY OF SCIENCE, ARTS, AND
TECHNOLOGY,

Appellant

v.

EDUCATIONAL COMMISSION FOR
FOREIGN MEDICAL GRADUATES;
DR. WILLIAM W. PINSKY, PRESIDENT AND
CEO, EDUCATIONAL COMMISSION FOR
FOREIGN MEDICAL GRADUATES

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-18-cv-05540)
District Judge: Hon. Wendy Beetlestone

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
May 19, 2020

Before: McKEE, BIBAS and COWEN, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted May 19, 2020. On consideration whereof,

It is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court, entered on June 25, 2019, is hereby AFFIRMED. All of the above in accordance with the opinion of the Court.

Costs Taxed Against Appellant.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: August 17, 2020

[ENTERED: June 25, 2019]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

DR. ORIENT L. TULP, Plaintiff,		CIVIL ACTION
v.		
		NO. 18-5540
EDUCATIONAL COMMISSION FOR FOREIGN MEDICAL GRADUATES AND DR. WILLIAM W. PINSKY, Defendants.		

MEMORANDUM OPINION

This case is, in effect, Plaintiff Orient Tulp’s challenge to the disciplinary action taken by Defendant Education Commission for Foreign Medical Graduates (“ECFMG”) against Plaintiff for providing false information about the branch campuses of an overseas medical school. The Court previously dismissed Plaintiff’s various constitutional and common law claims, with the sole exception of a common law due process claim. *See Tulp v. Educ. Comm’n for Foreign Med. Graduates*, 2019 WL 1382725, at *1 (E.D. Pa. Mar. 26, 2019). ECFMG now moves for summary judgment on this last remaining claim. For the reasons that follow, ECFMG’s motion will be granted.

I. LEGAL STANDARD

Summary judgment must be granted to a moving party if “there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). A genuine dispute “exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *U.S. ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89, 93 (3d Cir. 2018).

The party opposing the motion for summary judgment must “go beyond the pleadings,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and demonstrate that “a fact . . . is genuinely disputed” by “citing to particular parts of materials in the record,” Fed. R. Civ. P. 56(c); *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2007) (“The non-moving party may not merely deny the allegations in the moving party’s pleadings; instead he must show where in the record there exists a genuine dispute over a material fact.”). When the non-movant “fails to properly address [the movant’s] assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion,” and “grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.” Fed. R. Civ. P. 56(e)(2); *see, e.g., Payne v. City of Philadelphia*, 2016 WL 1298951, at *2 (E.D. Pa. Apr. 4, 2016).

In accordance with this Court’s policies and procedures, ECFMG submitted a statement of material facts along with its summary judgment motion, supported by citations to the record. Plaintiff’s response neither meaningfully addressed ECFMG’s assertions of fact nor demonstrated that any of those assertions were genuinely disputed. Instead, Plaintiff recited the allegations contained in

the Complaint or else produced conclusory assertions without citation to the record. Accordingly, the Court will consider ECFMG's account of the facts undisputed for purpose of resolving this motion.

Lastly, where, as here, a federal court is interpreting Pennsylvania law, the federal court must follow the Pennsylvania Supreme Court. *In re Energy Future Holdings Corp.*, 842 F.3d 247, 253-54 (3d Cir. 2016). If the law is unclear and there is no controlling precedent issued by Pennsylvania's highest court, a federal court must "predict" how it would rule, giving "due regard, but not conclusive effect, to the decisional law of lower state courts." *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000).

II. FACTS & PROCEDURAL HISTORY

A. ECFMG's Policies & Procedures

ECFMG is a private, non-profit organization based in Philadelphia that certifies international medical graduates ("IMGs") so that those students can pursue post-graduate medical training in the United States. Specifically, ECFMG: (1) certifies the readiness of IMGs through an evaluation of their qualifications, (2) verifies IMGs' education credentials, and (3) provides that information to graduate medical programs and other health care providers. As part of the verification process, ECFMG collects certain documentation from IMGs, including documentation confirming that graduates attended a recognized international medical school.

ECFMG defines an international medical school as "an education facility located in a country outside of the United States and Canada with its

primary campuses and main operations located in that country.” Where an international medical school operates branch campuses, ECFMG requires confirmation that “the branch campus is authorized to operate as a medical school in the branch campus country” and that the international medical school “awards degrees that meet the medical education eligibility requirements for licensure to practice medicine in the branch campus country.” Only graduates from a bona fide international medical school can obtain ECFMG certification.

To ensure the integrity of its certification process, ECFMG maintains policies to detect and snuff out “irregular behavior.” The policies are set forth in ECFMG’s publicly available Policies and Procedures Regarding Irregular Behavior, which define “irregular behavior” as “all actions or attempted actions on the part of applicants, examinees, potential applicants, others when solicited by an applicant and/or examinee, or any other person that would or could subvert the examination, certification or other processes, programs or services of ECFMG[.]” “Examples of irregular behavior include . . . submission of any falsified or altered document to ECFMG, whether submitted by the individual or by a third party, such as a medical school, on behalf of the individual,” and “falsification of information on applications, submissions, or other materials to ECFMG.” The Policies and Procedures make clear that “such actions or attempted actions are considered irregular behavior, regardless of when the irregular behavior occurs, and regardless of whether the individual is certified by ECFMG.”

The Policies and Procedures also set out a specific process by which ECFMG investigates suspected irregular behavior, determines whether an individual engaged in irregular behavior, and takes remedial action if a finding of irregular behavior is made:

- After receipt of a report or other information suggesting irregular behavior on the part of an individual, ECFMG staff will review the information and will assess whether there is sufficient evidence of irregular behavior. When indicated and feasible, staff will conduct a follow-up investigation to gather additional information.
- If ECFMG staff finds that there exists a reasonable basis to conclude that an individual may have engaged in irregular behavior, the matter will be referred to the Medical Education Credentials Committee [hereinafter “Credentials Committee”].
- [T]he individual will be advised in writing of the nature of the alleged irregular behavior and will be provided with a copy of the Policies and Procedures Regarding Irregular Behavior.
- The individual will be given an opportunity to provide written explanation and to present other relevant information.
- The individual may also request the opportunity to appear personally before the [Credentials Committee], and may be represented by legal counsel, if the individual so wishes.

- All pertinent information regarding the irregular behavior, including any explanation or other information that the individual may provide, will be provided to the [Credentials Committee]. The [Credentials Committee], based on the information available to it, will determine whether the preponderance of the evidence indicates that the individual engaged in irregular behavior.
- If the [Credentials Committee] determines that the individual engaged in irregular behavior, the [Credentials Committee] will determine what action(s) will be taken as a result of the irregular behavior. ECFMG will notify the individual whether the [Credentials Committee] determined the individual engaged in irregular behavior and of any action(s) taken pursuant thereto.
- The [Credentials Committee]’s determination of irregular behavior and any action(s) taken pursuant thereto . . . may be appealed to the Review Committee for Appeals if the individual has a reasonable basis to believe the [Credentials Committee] did not act in compliance with the Medical Education Credentials Committee Policies and Procedures or that the [Credentials Committee]’s decision was clearly contrary to the weight of the evidence before it.

B. ECFMG’s Investigation of Plaintiff

Plaintiff is President of the University of Science, Arts, and Technology (“USAT”), a medical school headquartered on the British Overseas Territory of Montserrat. In July and August of 2018,

ECFMG received information—including an email from the parent of a USAT student—indicating that USAT was offering classes in Miami, Florida. On August 21, 2018, ECFMG emailed Plaintiff, informing him that “[i]t ha[d] recently come to the attention of [ECFMG] that USAT in Montserrat is operating a satellite (or branch) campus in Miami, Florida,” and requesting Plaintiff produce “documentation from the United States Department of Education and/or the Florida Department of Education confirming that USAT’s Miami branch campus is authorized to operate as a medical school in the United States.” ECFMG never received any such documentation.

Instead, on August 21, 2018, Plaintiff responded to ECFMG’s email, as follows:

This is incorrect information. The Miami location is an information and testing site only . . . and an Orientation for new students is conducted prior to their traveling to the Caribbean. It is NOT a campus. Our ONLY Campus is located in Olveston, Montserrat, British West Indies.

Actually, recall that Montserrat is a volcanic Island, and the license issued to USAT in September, 2003 DOES actually permit the establishment of off-campus lecture and administrative sites as needed. USAT has students on island on a year round basis since its origination.

I hope this will clarify your concern.

On September 14, 2018, ECFMG's Vice President of Operations, Kara Corrado, sent Plaintiff a follow-up email, stating that ECFMG "received information USAT is providing medical education lectures not only at its Miami site, but also at sites in Tampa, FL, and Dallas, TX." The email ECFMG would "continue[] its review of this matter," and that "as part of its review, ECFMG has reached out to students and graduates of USAT in order to collect information from them regarding their attendance at USAT." Corrado continued:

Effective today, USAT students and graduates seeking services related to ECFMG Certification . . . must complete and submit an affidavit attesting to the accuracy of the medical school information provided to ECFMG. Services will not be provided to individuals who do not complete the affidavit. ECFMG has provided instructions about this process directly to the students and graduates.

Consistent with Corrado's email, ECFMG sent affidavits to USAT students and graduates, asking them to certify their dates of attendance at USAT as well as the location where they took their basic science courses. More than 300 students submitted affidavits indicating that they took classes in the United States; none indicated that they took courses in Montserrat.

On September 24, 2018, ECFMG also updated its Sponsor Note for USAT on the World Directory of Medical School—the directory maintained by ECFMG

to inform the public of the eligibility of a school's graduates to start the process of ECFMG certification. The Sponsor Note stated that "students and graduates of USAT are subject to enhanced procedures that must be met in order to be eligible for ECFMG Certification related services[.]"

**C. ECFMG's Irregular Behavior
Proceedings Against Plaintiff**

On October 18, 2018, ECFMG sent Plaintiff an email, advising him

of the allegation that you, individually and in your capacity as an official of the University of Science, Arts & Technology (USAT) Faculty of Medicine, Montserrat, engaged in irregular behavior in connection with providing false information to ECFMG. Specifically, you provided false information to ECFMG when you (1) notified ECFMG that USAT does not operate a branch campus in Miami, Florida and (2) certified to the attendance dates of several USAT students and graduates when ECFMG has information that these students were not attending USAT during some of the time periods to which you certified.

In addition, the letter summarized the procedure by which the Credential Committee would review the allegations. The letter: explained that matter was being referred to the Credential Committee for review at its November 28, 2018 meeting; advised Plaintiff to review the Credentials Committee's Policies and Procedures, which were attached to the email;

informed Plaintiff that he had the opportunity to appear before the Credential Committee on November 28, accompanied by legal counsel; listed the documents the Credential Committee would be reviewing on that date, which were also attached to the email; and, requested Plaintiff provide a written response to the allegations by November 1, 2018. On October 18, ECFMG also updated USAT's Sponsor Note, as follows: "As of January 1, 2019, students and graduates of this medical school with a graduation year of 2019 and later are not eligible to apply to ECFMG for ECFMG Certification[.]"

Plaintiff, through counsel, responded to ECFMG's letter on October 23, 2018.¹ Plaintiff confirmed that he would attend the November 28 hearing, requested additional documentation about the allegations, and questioned ECFMG's decision to change USAT's Sponsor Note prior to the hearing. On October 26, 2018, Corrado clarified that the allegations of irregular behavior concerned only Plaintiff's actions, and not USAT more broadly. Then, on November 14, 2018, Corrado emailed Plaintiff's counsel, confirming that:

[Plaintiff] is scheduled to appear before the ECFMG Committee with you and Mr. Reil (Dr. Tulp's attorneys) on Wednesday November 28, 2018 at 9:00 AM. . . . In accordance with ECFMG's standard practice, Dr. Tulp will be scheduled for 20 minutes, during which time he will have the opportunity to present his response to these allegations

¹ The letter was incorrectly dated September 23, 2018.

(either personally or through his counsel) and the ECFMG Committee members, ECFMG counsel, and staff will have the opportunity to ask questions. After that, Dr. Tulp may provide a brief, closing statement.

Corrado also provided Plaintiff's counsel with the materials that the Credentials Committee would review at the meeting. On November 16, 2018, Corrado sent Plaintiff's counsel a follow-up email to "confirm that you have received the materials that the ECFMG Committee will review at its meeting on November 28, 2018 related to the allegations of irregular behavior for [Plaintiff]." The same day, Plaintiff's counsel responded, stating that he had received the documents.

On November 28, 2018, Plaintiff appeared before the Credential Committee, accompanied by counsel. At the outset of the hearing, ECFMG again provided Plaintiff with copies of the materials under consideration. After Corrado summarized the allegations of irregular behavior, Plaintiff's counsel made his opening remarks, stating:

First, I would like to ask for the—I've asked and I've asked and I've asked for the packet that was presented to the committee members. I would like a copy of the packet, the information that was submitted to the committee members so that I will know what was considered by the committee before we came here today because you're considering information that I may or may not know about.

Counsel for ECFMG directed Plaintiff's counsel to the printed materials provided at the beginning of the hearing and reiterated that all materials under consideration by the Credential Committee had been provided to Plaintiff and his counsel on several occasions.

Plaintiff's counsel then made a series of legal arguments to the effect that ECFMG: (1) had "no jurisdiction over [Plaintiff]," (2) bore "the sole exclusive burden of proof," (3) had "a duty of presenting . . . evidence . . . before [Plaintiff] has to answer anything," but failed to do so, (4) "co-mingl[ed] . . . the prosecutorial and jury functions," (5) prejudged the matter by taking action against USAT, and (6) failed to provide Plaintiff with the "regulations and protocols for these meetings[.]" Plaintiff's counsel concluded: "That is our opening statement. If you have any questions, you can address them to me. [Plaintiff] will not be answering any questions."

Counsel for ECFMG and Plaintiff then engaged in a protracted back-and-forth, in which ECFMG's counsel invited Plaintiff to provide evidence or testimony addressing the allegations of irregular behavior and Plaintiff's counsel declined, arguing ECFMG carried the burden of production. After roughly nine minutes of this back-and-forth, counsel for ECFMG terminated the hearing, by stating: "You're not providing any evidence. So thank you for coming today[.]"

D. Irregular Behavior Determination

On December 14, 2018, ECFMG notified Plaintiff via email that the Credential Committee had completed its review and determined that Plaintiff

had engaged in irregular behavior. Specifically, the Credential Committee found Plaintiff provided false information when he “notified ECFMG that USAT does not operate a branch campus in Miami, FL” and “certified to the attendance dates of several USAT students and graduates when ECFMG has information that these students were not attending USAT during some of the time periods to which you certified.”

As a result, ECFMG informed Plaintiff that it was taking the following disciplinary action: (1) refusing, for a minimum of five years, to accept any documents signed and/or certified by Plaintiff; (2) adding to ECFMG’s Sponsor Note for USAT that “a certain official of [USAT] engaged in irregular behavior in connection with providing false information to ECFMG;” and, (3) making a permanent annotation in Plaintiff’s ECFMG record that he engaged in irregular behavior. ECFMG also informed Plaintiff that he had thirty days to appeal the decision. Plaintiff did not petition for reconsideration of the Credential Committee’s determination.

E. Procedural History

On December 24, 2018, Plaintiff initiated this action against ECFMG and Dr. William Pinsky, the President of ECFMG, and, on January 2, 2019, filed a motion for a preliminary injunction. On January 22, 2019, Defendants moved to dismiss the Complaint. Two days later, on January 24, 2019, the Court held a hearing on Plaintiff’s preliminary injunction motion and denied the request for preliminary relief for the reasons stated on the record. On March 26, 2019, the

Court granted Defendants' motion to dismiss as to all of Plaintiff's claims against Dr. Pinsky, and as to all of Plaintiff's claims against ECFMG, with the exception of the common law due process claim. *See Tulp*, 2019 WL 1382725 at *1. ECFMG now moves for summary judgment on this last claim.

III. DISCUSSION

"The touchstone of due process is protection of the individual against arbitrary action[.]" *Wolf v. McDonnell*, 418 U.S. 539, 5588 (1974). Many jurisdictions, Pennsylvania included, recognize a limited common law due process cause of action in addition to the more familiar constitutional due process cause of action. *See McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 534-35 (3d Cir. 1994) (Becker, J., concurring in the judgment) (collecting cases); *Sch. Dist. of City of Harrisburg v. Pa. Interscholastic Athletic Ass'n*, 309 A.2d 353, 357 (Pa. 1973) (recognizing the existence of a common law duty).

Under Pennsylvania law, "private associations" owe a common law duty of due process "only under limited circumstances." *Sch. Dist. of City of Harrisburg*, 309 A.2d at 357. One such instance is where a private organization that serves a public function subjects a party to disciplinary action. *See Psi Upsilon of Phila. v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. 1991) (holding that the University of Pennsylvania, a private organization, owed a common law duty of due process to a group of college students that it subjected to disciplinary action); *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 579 (Pa. Super. 1990) (holding that the University of

Pennsylvania owed a common law duty to graduate students disciplined for academic misconduct). The duty “operate[s] as a ‘check on organizations that exercise significant authority in areas of public concern such as accreditation and licensing.’” *Prof’l Massage Training Ctr., Inc. v. Accreditation All. of Career Sch. & Colls.*, 781 F.3d 161, 169 (4th Cir. 2015) (quoting *Thomas M. Cooley Law Sch. v. Am. Bar Ass’n*, 459 F.3d 705, 712 (6th Cir. 2006)). Because such “quasi-public” organizations, “like all other bureaucratic entities, can run off the rails,” the common law duty of due process ensures that such entities are not “wholly free of judicial oversight.” *Id.*

“The requirements of common law due process are quite similar to those for constitutional due process[.]” *McKeesport Hosp.*, 24 F.3d at 535. Common law due process requires that the disciplining organization adhere “to those procedural safeguards which the [organization] specifically provides.” *Psi Upsilon*, 591 A.2d at 759; *Boehm* 573 A.2d at 585 (finding due process satisfied where the University “followed its Code of Rights punctiliously”). In addition, those procedural safeguards must accord with “basic principles of . . . fundamental fairness,” meaning “notice” and “an opportunity to be heard.” *Psi Upsilon*, 591 A.2d at 759; *Boehm* 573 A.2d at 585 (holding due process met where plaintiff “had notice and an opportunity to be heard”); *Sch. Dist. of City of Harrisburg*, 309 A.2d at 358 (holding due process requirement where disciplined party “was afforded notice of the action

taken against it and . . . availed itself of the opportunity to be heard”).²

The notice requirement is satisfied where the disciplinary body provides “notice of the charges against [the disciplined party] and also of the evidence against [the disciplined party].” *Boehm*, 573 A.2d at 582; *Psi Upsilon*, 591 A.2d at 759 (holding plaintiffs afforded notice where University provided statement laying out charges and reciting factual allegations underpinning charges). As for an opportunity to be heard, the disciplinary body must provide “an opportunity [for the disciplined party] to present his side of the story.” *Biliski v. Red Clay Consol. Sch. Bd. of Educ.*, 574 F.3d 214, 220 (3d Cir. 2009) (quoting *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)). Thus, due process requires “the opportunity to present reasons, either in person or in writing, why proposed action should not be taken.” *Id.* (quoting *Loudermill*, 470 U.S. at 542);

² When dealing with constitutional due process claims, Pennsylvania courts apply the familiar balancing test set out in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to determine the amount of process due. *Id.* at 335; see, e.g., *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018). But the few Pennsylvania cases to address common law due process claims have not employed the *Matthews v. Eldridge* framework. See, e.g., *Psi Upsilon*, 591 A.2d at 759; *Boehm* 573 A.2d at 585. Instead, those cases have employed a case-by-case analysis into whether the disciplined party was “given a fair hearing.” *Boehm* 573 A.2d at 584. Accordingly, this Court predicts that Pennsylvania law would not require the Court to apply *Matthews v. Eldridge* here, but rather, requires the Court to evaluate whether Plaintiff was “given a fair hearing” by reference to those Pennsylvania cases that have evaluated common law due process claims, and cases concerning due process more generally. Cf. *McKeesport Hosp.*, 24 F.3d at 535 (“The requirements of common law due process are quite similar to those for constitutional due process[.]”).

Boehm, 573 A.2d at 508 (explaining that an individual must be provided with the opportunity to “produce either oral testimony or written affidavits of witnesses on his behalf”) (quoting *Dixon v. Al. State Bd. of Ed.*, 294 F.2d 150, 158 (5th Cir. 1961)). Where in-person testimony is permitted, such hearings “need not be elaborate,” *Biliski*, 574 F.3d at 220 (quoting *FDIC v. Mallen*, 486 U.S. 230, 247 (1988)), “subject to strict rules of judicial procedure,” *Psi Upsilon*, 591 A.2d at 761, or have all the trappings of “a full-dress judicial hearing,” *Boehm*, 573 A.2d at 508 (quoting *Dixon*, 294 F.2d at 158).

Here, as the Court previously explained, ECFMG is a “quasi-public” private organization because it “exercises significant authority in areas of public concern,” *Profl Massage Training Ctr.*, 781 F.3d at 169—namely, by certifying IMGs so that those students can pursue post-graduate medical training in the United States and ensuring the integrity of that certification process, *Tulp*, 2019 WL 1382725 at *5-6. As such, it must “employ fair procedures when making decisions,” with regard to individuals—like Plaintiff—that it subjects to disciplinary action. *McKeesport*, 24 F.3d at 535. Thus, ECFMG owed Plaintiff a common law duty of due process throughout the irregular behavior investigation.

The undisputed facts demonstrate that ECFMG complied with that duty. First, its investigation and irregular behavior determination adhered to the procedural safeguards set forth in its publicly-available Policies and Procedures—specifically,

- Whereas the Policies and Procedures provide that “[i]f ECFMG staff finds that there exists a reasonable basis to conclude that an individual may have engaged in irregular behavior, the matter will be referred to the [Credentials Committee];” here, after an investigation into USAT’s Florida-based campuses revealed that Plaintiff provided false information regarding USAT’s operations, ECFMG referred the issue to the Credentials Committee for a hearing;
- Whereas the Policies and Procedures provide that “the individual will be advised in writing of the nature of the alleged irregular behavior and will be provided with a copy of the Policies and Procedures Regarding Irregular Behavior;” here, on October 18, 2018, ECFMG emailed Plaintiff: a letter advising him of the irregular behavior allegations, a copy of the Policies and Procedures Regarding Irregular Behavior, and copies of the documents provided to the Credentials Committee upon which the allegations were based;
- Whereas the Policies and Procedures provide that “[t]he individual will be given an opportunity to provide written explanation and to present other relevant information;” here, in the October 18 email, ECFMG provided Plaintiff an opportunity to provide a written response to the charges of irregular behavior, and, on October 23, 2018, Plaintiff’s counsel provided a written response to the allegations;

- Whereas the Policies and Procedures provide that “[t]he individual may also request the opportunity to appear personally before the [Credentials Committee], and may be represented by legal counsel, if the individual so wishes;” here, in the same October 18 email, ECFMG informed Plaintiff of that opportunity, and, on November 28, 2018, Plaintiff was afforded the opportunity to present evidence and testimony to the Credential Committee, accompanied by counsel;
- Whereas the Policies and Procedures provide that the “[Credentials Committee], based on the information available to it, will determine whether the preponderance of the evidence indicates that the individual engaged in irregular behavior;” here, after reviewing the documentary evidence and Plaintiff’s November 28 presentation, the Credential Committee determined that Plaintiff had engaged in irregular behavior by providing false information about USAT’s activities;
- Whereas the Policies and Procedures provide that “ECFMG will notify the individual whether the [Credentials Committee] determined the individual engaged in irregular behavior and of any action(s) taken pursuant thereto;” here, on December 14, 2018, ECFMG notified Plaintiff via email that the Credential Committee had determined that he engaged in irregular behavior, explained the grounds for that decision, and informed Plaintiff of the disciplinary action being taken against him;

- Whereas the Policies and Procedures provide that the “[Credentials Committee]’s determination of irregular behavior and any action(s) taken pursuant thereto . . . may be appealed;” here, in the December 14 email, ECFMG informed Plaintiff of his ability to appeal the decision.

Thus, ECFMG followed “the procedural safeguards which [it] specifically provide[d].” *Psi Upsilon*, 591 A.2d at 759.

Second, the procedural safeguards ECFMG provided comported with “basic principles of . . . fundamental fairness” because they afforded Plaintiff both notice and an opportunity to be heard. *Id.* As to notice, ECFMG’s October 18 email advised Plaintiff of the irregular behavior allegations and provided copies of the documents upon which those allegations were based, satisfying the notice requirement. *Id.*; *Boehm*, 573 A.2d at 582. As for an opportunity to be heard, ECFMG afforded Plaintiff the opportunity to provide a written response to the allegations of irregular behavior and to present oral testimony at the November 28 hearing—opportunities that Plaintiff, through his counsel, took advantage of. Accordingly, Plaintiff was provided “the opportunity to present reasons, [both] in person [and] in writing, why [ECFMG’s] proposed action should not be taken,” satisfying the opportunity-to-be-heard requirement. *Biliski*, 574 F.3d at 221.

Plaintiff arguments to the contrary are scattershot and, at times, difficult to follow. The gist appears to be that the November 28 hearing was inadequate and therefore deprived Plaintiff of a

meaningful opportunity to be heard.³ There are several problems with Plaintiff's position. To start—and putting the November 28 hearing aside for now—Plaintiff was afforded an opportunity to be heard when ECFMG invited him to submit a written reply to the allegations of irregular behavior. All that due process required here was the “opportunity to present reasons, *either in person or in writing*, why proposed action should not be taken,” *Biliski*, 574 F.3d at 220 (emphasis added). The fact that Plaintiff was invited to present written responses to the allegations of irregular behavior puts paid to the argument that ECFMG deprived him of an opportunity to be heard.

Turning to the November 28 hearing, Plaintiff complains that the hearing was procedurally inadequate—because ECFMG allotted only twenty minutes for it, because ECFMG relied on its documentary evidence and did not present live testimony, and because ECFMG did not allow him to cross-examine witnesses. But, as already noted, due process does not require the full panoply of procedural protections available in other proceedings. *See Boehm*, 573 A.2d at 508 (holding due process does not require “a full-dress judicial hearing, with the right to cross-examine witnesses”) (internal quotation marks omitted); *Sch. Dist. of City of Harrisburg*, 309 A.2d at 358 (finding due process met where petitioner “offered testimony,” at “a regularly scheduled meeting” of the disciplinary body). Here, all that ECFMG was required to provide was an opportunity for Plaintiff

³ Plaintiff neither appears to argue that ECFMG failed to adhere to the procedural safeguards set forth in the publicly-available Policies and Procedures, nor that ECFMG provided inadequate notice of the allegations against him.

“to present his side of the story,” *Biliski*, 574 F.3d at 220 (internal quotation marks omitted), and the November 28 hearing satisfied that requirement.

Lastly, Plaintiff argues that the early termination of the hearing violated his due process rights. The record demonstrates, however, that after delivering his opening statement, Plaintiff declined to provide additional evidence or testimony, and that ECFMG then terminating the hearing. Plaintiff’s choice to sit on his hands, however, does not render the November 28 hearing inadequate. *Cf. Psi Upsilon*, 591 A.2d at 760 (holding disciplinary hearing did not violate due process where plaintiffs invoked privilege against self-incrimination, given pending criminal charges, and thus did not testify or present evidence). Thus, Plaintiff was given ample opportunity “to present his side of the story,” *Biliski*, 574 F.3d at 220; “if [he] did not make the best use of those opportunities . . . the blame cannot be placed on [ECFMG],” *Marlboro Corp. v. Ass’n of Indep. Colls. & Sch., Inc.*, 556 F.2d 78, 82 (1st Cir. 1977).

In sum, the record demonstrates that ECFMG provided Plaintiff all the process he was due. ECFMG’s motion for summary judgment on Plaintiff’s common law due process claim will be granted accordingly.

June 25, 2019 BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

[ENTERED: June 25, 2019]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

DR. ORIEN L. TULP,		CIVIL ACTION
Plaintiff,		
v.		
		NO. 18-5540
EDUCATIONAL COMMISSION		
FOR FOREIGN MEDICAL		
GRADUATES AND		
DR. WILLIAM W. PINSKY,		
Defendants.		

ORDER

AND NOW, this 25th day of June, 2019, upon consideration of Defendant Education Commission for Foreign Medical Graduates' Motion for Summary Judgment (ECF No. 31), and Plaintiff's opposition thereto (ECF No. 33), **IT IS HEREBY ORDERED** that Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of Court shall mark this case as **CLOSED**.

BY THE COURT:

/S/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.