

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel.	:	
Schiffbauer, et al.	:	Case No. 2014-0244
	:	
Relator,	:	
	:	ORIGINAL ACTION IN
v.	:	MANDAMUS
	:	
Larry Banaszak, et al.	:	
	:	
Respondent.	:	

RESPONDENTS' LARRY BANASZAK AND ROBERT GATTI (REFERRED TO COLLECTIVELY AS "THE UNIVERSITY") MEMORANDUM CONTRA RELATOR'S MOTION FOR STATUTORY DAMAGES AND ATTORNEY FEES

I. INTRODUCTION

Until May 21, 2015, the University considered itself to be a private University and did not consider itself or its police department to be a "public office" or have any individual designated to respond to Public Record Act requests pursuant to R.C. 149.43 ("the PRA"). University employees considered themselves to be private employees of a private University and did not consider themselves subject to either the benefits or obligations of a public office. The PRA provides that the Court may award attorney fees to the prevailing party if a public office fails to produce copies of public records within a reasonable time.¹ There is an inapplicable provision for the "mandatory" award to attorney fees if the University failed to respond to the request or if it promised to deliver the documents by certain date and failed to do so. *Id.* at (C)(2)(b)(i)-(ii).

In this case, there are no allegations that the University failed to respond to the request or that it promised to deliver the records by a certain date. As a result, mandatory attorney fees are

¹ R.C. 149.43(C)(2)(b).

not available in this action. This is especially the case where the Relator *already had* the records, all members of the public had access to the same records at the Westerville Mayor's Court, Westerville Municipal Court and/or Westerville Police Department, the lawsuit was filed as a test case to challenge an unsettled area of law and Relator herself did not actually pay legal expense and therefore is not entitled to reimbursement for expenses she never actually paid.

Further, the Court has the discretion to reduce them or to refuse to grant them altogether if the conduct of the public office or person responsible for the requested public records reasonably believed that the conduct did not constitute a failure to comply:

The court may reduce an award of attorney's fees to the relator **or not award attorney's fees to the relator if the court determines both of the following:**

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct. Id. at (C)(2)(c).

The two part test included in the statute for refusing to grant or to reduce statutory damages or attorney fees comport with the longstanding practice of this Court that "courts should not be in

the practice of punishing parties for taking a rational stance on an unsettled legal issue.”² The University’s conduct was reasonable and in compliance with public policy in light of the advice the University received from the Ohio Attorney General, consistent advice received from two law firms, the actions of the General Assembly based on the assumption of the General Assembly that the PRA under current statutory and case law did not apply to private University police departments and the countervailing public policy in the privacy rights of students in student records in a complex statutory scheme to which a University must comply codified in the Family Educational Rights and Privacy Act, 20 U.S.C. Section 1232g(a)(4)(A) (“FERPA”) and the Clery Act, 20 U.S.C. 1092, as well as announcements of the U.S. Department of Education and Office of Civil Rights (“OCR”).³

² See: *State ex rel. Olander v. French* (1997), 79 Ohio St. 3d. 176, 179, 1997 Ohio 171, 680 N.E.2d 962 (**Courts should not be in the practice of punishing parties for taking a rational stance on an unsettled legal issue**). See also: *Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010 Ohio 5680, 938 N.E.2d 347 (the school district’s position that it could withhold the documents until it picked them up from the post office box and reviewed them was reasonable and **attorney fee request denied**); *Toledo Blade v. Seneca County Board of Commissioners* (2008), 120 Ohio St.3d 372 , 2008 Ohio 6253, 899 N.E.2d 961 (“on the novel issue of the recovery of deleted emails, the board’s argument was not unreasonable” **and request for fees denied**); *Cincinnati Enquirer v. Jones-Kelley*(2008), 118 Ohio St.3d 81, 208 Ohio 1770, 886 N.E. 2d 206 (the Court emphasized that the court had not previously considered claimed exceptions to the disclosure of certain information about certified foster caregivers and **denied attorney fee request**)

³ *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St. 3d. 236, 2010 Ohio 5680, 938 N.E.2d 347 (2010) (even if Enquirer had prevailed, it would not have been entitled to attorney fees).

II. SUMMARY OF ARGUMENT

- A. **BASED ON THE ORDINARY APPLICATION OF THE STATUTORY AND CASE LAW AS IT EXISTED AT THE TIME, THE UNIVERSITY ACTED REASONABLY IN ITS CONDUCT**
- B. **THE UNIVERSITY'S CONDUCT IN NOT DISCLOSING RECORDS WHICH RELATOR ALREADY HAD WAS CONSISTENT WITH PUBLIC POLICY AND DID NOT DEPRIVE THE PUBLIC ACCESS TO RECORDS WHICH RELATOR ALREADY HAD AND WERE ALWAYS AVAILABLE AT THE WESTERVILLE MAYOR'S COURT, WESTERVILLE MUNICIPAL COURT AND/OR WESTERVILLE POLICE DEPARTMENT.**
- C. **RELATOR IS NOT ENTITLED TO REIMBURSEMENT OF LEGAL EXPENSE RELATOR NEVER PAID.**
- D. **COURTS SHOULD NOT PUNISH THE UNIVERSITY FOR TAKING A REASONABLE STANCE ON AN UNSETTLED LEGAL ISSUE**

III. DISCUSSION

- A. **BASED ON THE ORDINARY APPLICATION OF THE STATUTORY AND CASE LAW AS IT EXISTED AT THE TIME, THE UNIVERSITY ACTED REASONABLY IN ITS CONDUCT**

As demonstrated by the 4-3 split decision and dissent in this case, well-informed public officials could reasonably conclude that a private University police department was not subject to the PRA under then existing statutory and case law. There was no prior case law that directly addressed this point. The fact this legal issue was unsettled is presumably why Relator filed the present case when Relator already had the records sought in the lawsuit. It must be emphasized that Relator already had the requested records and those records were also *always available to Relator and other members of the public* at the public offices of the Westerville Mayor's Court, Westerville Municipal Court and/or Westerville Police Department. Those Westerville public offices had no FERPA student privacy concerns and had statutory immunity under R.C. 2744 for defamation or libel *per se* lawsuits for disclosure of records alleging a student committed

criminal conduct. Although the Court ruled in a close and divided 4-3 decision that the law is different than what the University and dissent believed it to be does not demonstrate that the University's position was unreasonable.

At time the University first created its police department, the University sought legal guidance regarding the application of the PRA to its police department by sending two of its police department employees on November 2, 2011 to the Sunshine Law training. The Sunshine Law seminars are provided by the Ohio Attorney General for the purpose of advising the public of their legal rights and obligations under the PRA. Deputy Chief of Police Douglas Williard and Sergeant Robert Reffitt attended the Sunshine Law training seminar provided by the Ohio Attorney General on November 2, 2011 to determine the University's legal obligations under the PRA.⁴ During the training, the presenter, Assistant Attorney General Attorney Robert Moorman ("Assistant Attorney General Moorman") discussed this Court's decision in *Oriana House, supra* and its progeny. After listening to the presentation by Assistant Attorney General Moorman regarding *Oriana House, supra*, Deputy Chief Williard and Sergeant Reffitt approached and questioned Assistant Attorney General Moorman at a break and specifically asked whether the University's Police Department was subject to the PRA.

After disclaiming that he was not the University's legal counsel and could not provide a binding legal opinion, Assistant Attorney General Moorman advised Deputy Chief Williard and Sergeant Reffitt "with specific detail that in his opinion it is 'well established' through the *Oriana House* case standard that Otterbein University's Police Department was *not* subject to Ohio's Public Records Act."⁵ Rather than merely rely on the advice of the Assistant Attorney General, the University then also sought the independent legal advice of its own counsel. The

⁴ See: October 21, 2014 Affidavit of Deputy Chief Douglas A. Williard attached as **Exhibit A**.

⁵ See: Deputy Chief Williard Affidavit at Paragraph 11 attached as **Exhibit A**.

University was similarly advised by its legal counsel, Blaugrund, Herbert, Kessler, Miller, Myers and Postalakis, LLP, which agreed with the analysis of Assistant Attorney General Moorman. Subsequently, this firm concurred with the prior advice of both the Assistant Attorney General and the Blaugrund law firm. The University acted reasonably in relying on the advice of the Assistant Attorney General provided at a seminar conducted by the Attorney General to advise the public of its rights and obligations under the PRA and the advice of two separate law firms.

Relator now argues that once the Attorney General filed an amicus brief in this action and took a position that was contrary to the guidance provided by the Ohio Assistant Attorney General on November 2, 2011, the question was settled law in Ohio and the University should have provided the documents (which Relator already had from the Westerville Mayor's Court, Westerville Municipal Court and/or Westerville Police Department). However, when the Attorney General takes a position as an amicus, that position is not law, especially when the position runs counter to guidance provided to the opposing party at a seminar the Attorney General is required to conduct pursuant to statute to advise the public of its legal rights and obligations under the PRA. Further, there were no advisory opinions issued by the Attorney General on whether a private university police department is subject to the PRA. Because the Attorney General takes a position as amicus, however, does not mean this Court will accept the position. It was not unreasonable for the University to rely on the prior advice of the Assistant Attorney General Moorman confirmed by the advice of two separate law firms.

The actions of the General Assembly demonstrate that "well informed public officials" reasonably believed that the then existing statutory and case law did not require application of the PRA to private University police departments. Based on the legislation proposed by members of the General Assembly in HB 411 and HB 429, well informed state legislators

similarly believed that private university police departments were not subject to the PRA. No member of the legislature suggested that the proposed amendments were merely clarifications when proposing HB 411 and HB 429. The reasonable belief that the PRA did not apply to private university police departments led to the introduction of at least two bills in the Ohio House to amend the Act in order to expand the PRA to expressly apply to private university police departments.

Members of the General Assembly are “well informed public officials” who drafted and passed R.C. 149.43 and are in a position to know whether the act is legislated already applied to private university police departments. HB 411 and HB 429 would not have been introduced if the members who sponsored them believed that private University police departments were already clearly covered by the PRA. It was reasonable for the University to believe it was not subject to the PRA when members of the General Assembly who drafted and passed the PRA were taking the same position.

The University and its attorneys also monitored *ESPN v. University of Notre Dame Security Police Department*, Case No. 71D07-1501-MI-00017 (St. Joseph Superior Ct. April 20, 2015), a similar case very recently decided under Indiana Law in which Notre Dame was facing similar concerns with protecting student privacy interests codified in FERPA and the issue of public access to the Notre Dame police department records.⁶ Because it is a private university, Notre Dame denied ESPN’s request for records kept by its police department. ESPN brought suit under Indiana’s PRA, arguing that the documents were public records. Only a month before this

⁶ See: February 12, 2015 Defendant Notre Dame’s Brief Supporting Dismissal and Judgment on the Pleadings and recent April 20, 2015 Order on Cross Motions for Dismissal and Judgment on the Pleadings determining that the University of Notre Dame Security Police Department was not a separate entity and that its records were *not* subject to Indiana’s PRA, attached collectively as **Exhibit B**.

Court's decision, the Indiana Superior Court held on April 20, 2015 that Notre Dame's police department did not become a public agency because it exercised the power to appoint police officers pursuant to statutory powers granted to it.

The Indiana Superior Court, consisting of "well-informed public officials" determined that Notre Dame's police department is *not* a separate public legal entity. The Indiana Superior Court determined that the police department of a private university such as Notre Dame was not a public agency therefore was *not* required to respond to a PRA request. This recent April 20, 2015 decision of the Indiana Superior Court provides further evidence that this legal issue was unsettled and that reasonable and well informed public officials in a sister state could reach the same decision as was reached by the University in this case that a private University police department was not subject to the PRA.⁷

Prior to the May 21, 2015 decision in this case, this Court has not ruled that the police department of a private university was a public office, nor had the Court previously ruled that a department of a private corporation was a public office while the rest of the corporation was not. Prior to this Court's May 21, 2015 ruling, this area of law was unsettled and not clear. An Assistant Attorney General, two law firms, the dissent in this case and members of the General Assembly were well informed and reasonable when they all believed prior to this Court's May 21, 2015 decision that a private University's police department was *not* required to respond to public records under the PRA and then existing case law.

In brief, Relator's request for statutory damages and attorney fees should be denied because the University's conduct was reasonable regarding a previously unsettled legal issue of whether private university police departments were subject to the PRA.

⁷ *Notre Dame, supra* attached as **Exhibit B**.

B. THE UNIVERSITY'S CONDUCT IN NOT DISCLOSING RECORDS WHICH RELATOR ALREADY HAD WAS CONSISTENT WITH PUBLIC POLICY AND DID NOT DEPRIVE THE PUBLIC ACCESS TO RECORDS WHICH RELATOR ALREADY HAD AND WERE ALWAYS AVAILABLE AT THE WESTERVILLE MAYOR'S COURT, WESTERVILLE MUNICIPAL COURT AND/OR WESTERVILLE POLICE DEPARTMENT.

The University's position to not disclose records identifying the names of students who were alleged perpetrators or alleged victims of crime was not adverse to public policy. Because Relator already had the records Relator requested, public access to the records was not the issue of the lawsuit. All of the information that Relator sought was always available at the public offices of the Westerville Police Department, Westerville Mayor's Court and/or the Westerville Municipal Court. Consequently, the University's position did not deprive the public of access to any information.

Further, the University is subject to and must consider other laws and federal agency directives reflecting a strong public policy to protect the privacy rights of students.⁸ The disclosure that a student has been accused of a crime or has been the alleged victim of a crime is a potentially devastating disclosure for a young adult.⁹ Private Universities are confronted with a complex and potentially conflicting state and federal statutory scheme designed to protect conflicting public interests, including a student's expectation of the confidentiality of student records, including student disciplinary records. FERPA's statutory scheme is premised on the public policy interest in a student's right to confidentiality. FERPA's prohibition on the

⁸ Although a Motion to Dismiss was briefed, that motion by rule is limited only to the adequacy of the face of the Complaint. As noted by the dissent in this case, other than the Motion to Dismiss, the merits of the case were not otherwise briefed before this Court's May 21, 2015 opinion.

⁹ The University's legitimate public policy concern for student expectations of privacy is not hypothetical. The University Dean of Students has responded to a distraught parent whose daughter had a student newspaper reporter telephone a female student and ask for an interview the day after she had reported a sexual assault and was in effect "re-victimized" by the reporter.

disclosure of student records includes exceptions for “law enforcement unit” records. However, FERPA, in an “exception to the exception,” prevents disclosure of “law enforcement unit” records involving student disciplinary investigations conducted by the University “law enforcement unit.”¹⁰ Most alleged crimes are also alleged violations of the Student Code of

¹⁰ 34 CFR Section 99.8 provides in relevant part that: (a)(1) Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to –

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are --

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) **Records of a law enforcement unit does not mean --**

(i) **Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or**

(ii) **Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.**

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) **Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.** [footnote continued on next page]

Conduct and are also the subject to student disciplinary action which may also be investigated by the same campus police. Alleged criminal conduct by students may be subject to investigation records that are privileged under FERPA if they involve campus police investigation of alleged student disciplinary violations which are also alleged crimes.¹¹ The University must consider the FERPA public policy concern in non-disclosure of student education records, which include student disciplinary investigation records, especially a record of the University that discloses the identity of student who is the alleged perpetrator or alleged victim of a crime.¹²

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

¹⁰ See: e.g. *Wells v. Xavier University*, U.S. District Court Southern District of Ohio, Case No. 1:13-CV-00575 Private University is subject to possible defamation or libel *per se* claim for public statement that student had committed serious violation of Code of Student Conduct or crime and private University's Motion to Dismiss the defamation claim for implicitly alleging the student committed a crime was denied attached as **Exhibit C**. See also: *Mallory v. Ohio University*, 76 Fed. Appx. 634 (6th Cir. 2003) (University officials subject to defamation claim for statement by University officials that student of university had committed a crime) attached as **Exhibit D**.

¹¹ The Healthcare Portability and Accountability Act ("HIPAA") has confidentiality requirements for patient records analogous to those of FERPA for student records. In an analogous case, the United States District Court for the Northern District of Ohio held that although HIPAA provides that a grand jury subpoena for confidential patient records can be honored under 45 C.F.R. Section 164.512(f)(1)(ii)(B), without breaching HIPAA confidentiality, the state statute under R.C. 2317.02 prohibits disclosure. The Court therefore held that an institution may *not* disclose confidential records if there is a conflict between the federal and state statutory scheme. In *Turk, supra*, the Court held that because the state confidentiality statute did not have the exception to confidentiality for grand jury subpoena responses as HIPAA provided, the Cleveland Clinic *and its attorneys* could be held liable for the wrongful disclosure of patient information in response to a grand jury subpoena permitted by HIPAA but prohibited by the more stringent state statute. See: *Turk v. Oiler*, 732 F. Supp.2d 758 (N.D. Ohio 2010). For an institution attempting to comply with a complex and arguably conflicting state and federal statutory scheme regarding disclosure of confidential patient (or student) records under HIPAA (or FERPA), *Turk, supra*, suggests that an institution should err on the side of non-disclosure and seek judicial guidance since disclosure is irreversible and disclosure of confidential records may create liability and cannot be "undone" if it is later determined by a court that the disclosure was improper. *Id., supra*.

¹² As noted previously, the University's legitimate public policy concern with student privacy has a basis in fact. For instance, the University Dean of Students has had to personally answer

The Clery Act, 20 U.S.C. 1092, also provides guidance on the public interest in protecting student's expectations of privacy by both the alleged accused and the alleged victim. Pursuant to the Clery Act, the University is required to release information about certain crimes on campus, including sexual assaults. It is also required to keep a log of those crimes that was always available to Relator and other members of the public. The Clery Act and accompanying CFR regulations, however, **prohibit the University from publishing the victim's name as part of the log as well as the identity of the person accused of crimes.**¹³

The Clery Act, at 34 CFR 668.46(f)(2) provides:

“The institution must make an entry or an addition to an entry to the log within two business days, as defined under paragraph (a) of this section, of the report of the information to the campus police or the campus security department, **unless that disclosure is prohibited by law or would jeopardize the confidentiality of the victim.**”

Current 34 CFR 668.46(c)(5) states:

“Identification of the victim or the accused. **The statistics required under paragraphs (c)(1) and (3) of this section may not include the identification of the victim or the person accused of committing the crime.**”

concerns of an understandably distraught parent whose daughter was telephoned by a student newspaper reporter the day after the student had been allegedly sexually assaulted to ask her for an interview. The legitimate public interest in student confidentiality codified in FERPA is therefore another public interest that the University is required to consider.

¹³ 20 USC 1092(f)(4)(B)(i) re daily crime log: (B) (i) All entries that are required pursuant to this paragraph shall, except where disclosure of such information is prohibited by law **or such disclosure would jeopardize the confidentiality of the victim**, be open to public inspection within two business days of the initial report being made to the department or a campus security authority.

20 USC 1092(f)(7) re statistics: (7) The statistics described in clauses (i) and (ii) of paragraphs (1)(F) shall be compiled in accordance with the definitions used in the uniform crime reporting system of the Department of Justice, Federal Bureau of Investigation, and the modifications in such definitions as implemented pursuant to the Hate Crime Statistics Act [28 USCS § 534 note]. For the offenses of domestic violence, dating violence, and stalking, such statistics shall be compiled in accordance with the definitions used in section 40002(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)). **Such statistics shall not identify victims of crimes or persons accused of crimes.**

The Clery Act therefore provides a federal statutory and public policy directive **that neither the identity of the alleged perpetrator nor the identity of alleged victim should be disclosed by a University.**

In addition to FERPA and the Clery Act, the U.S. Department of Education and Office of Civil Rights (“OCR”) have also issued guidance to universities based on the public policy in preventing disclosure of the identity of students who are either alleged perpetrators or alleged victims of crime. Pursuant to the public policy of protecting student expectations of privacy, OCR requires universities to avoid practices that would “revictimize” the victim by disclosing an alleged victim’s identity, in part because of the concern that disclosure of the identities of students involved in sexual assault on campus could discourage reporting of such crimes.¹⁴

A private University such as Respondent must balance these conflicting state and federal statutes and public policy student privacy concerns with its obligation to respond to a PRA request for records which the Relator already had. Once disclosure is made it is irreversible and disclosure cannot be retracted if later determined by a Court to be improper.

¹⁴ See: e.g. 2014 Office of Civil Rights Q&A on Sexual Violence, released by the Office for Civil Rights, excerpt from section E-1 on pages 18-19 notes attached as **Exhibit E** : **“OCR strongly supports a student’s interest in confidentiality in cases involving sexual violence.** There are situations in which a school must override a student’s request for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school’s response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, **a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. ... Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school’s response.** ... For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator, ... the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.”

Further, if such records were disclosed without a clear Court requirement to do so, the University faced defamation or libel *per se* claims without immunity under R.C. 2744 as well as possible claims of violations of FERPA, the Clery Act and OCR guidelines.¹⁵ A private university may be subject to a defamation claim or libel *per se* claim for releasing a statement that a student allegedly committed a criminal act. For instance, as referenced in footnote 9 above, a student recently filed a defamation claim against a private Ohio university and its president as a result of that university's press release stating that the university's student disciplinary board had held the student in violation of the Student Code of Conduct and that "serious violations of the Student Code of Conduct would not be tolerated." The student filed a lawsuit alleging that the private university's statement regarding his expulsion was false because he did not violate the student code of conduct. As a private university, the defendant and its president had no basis for asserting it was a public office subject to immunity under R.C. 2744. The United States District Court for the Southern District of Ohio overruled the private University's Motion to Dismiss and the case was recently settled by the defendants university and its president.¹⁶

In brief, in this unsettled area of law, the University was required to consider a complex and unsettled federal and state statutory scheme and countervailing public policy interests in

See: *Havlik v. Johnson & Wales University*, 490 F. Supp.2d 250 (R.I. 2007) attached as **Exhibit F**. Johnson & Wales University was determined to be privileged from defamation claim to publish a Crime Alert identifying student alleged to have committed criminal acts because Clery Act required such a Crime Alert. In the absence of such a Clery Act requirement for a Crime Alert or public office immunity, presumably that privilege from a defamation or libel *per se* claim would not apply. Therefore, a well-informed institution could reasonably err on the side of non-disclosure if there is a legitimate issue under FERPA, the Clery Act and/or Department of Education or OCR directives that disclosure of the identity of alleged student perpetrators or alleged student victims is prohibited.

¹⁶ See: e.g., *Wells v. Xavier University*, S.D. Ohio No. 1:13-CV-00575, 2014 WL 972172 (March 11, 2014) attached as **Exhibit C**.

protecting students' expectations of privacy codified in FERPA and the Clery Act. Disclosure that a young adult is either the alleged perpetrator or victim of a crime can be devastating. Especially when the Relator already had the records which were available to all members of the public at the Westerville Mayor's Court, Westerville Municipal Court and/or Westerville Police Department, the University acted reasonably in an area of previously unsettled statutory and case law.

C. RELATOR IS NOT ENTITLED TO REIMBURSEMENT OF LEGAL EXPENSE RELATOR NEVER PAID.

In the present case, the affidavit submitted with Relator's motion does not list any payments by Relator and provides documentation that Relator, a recent college graduate, never actually paid any legal bill. "There is no entitlement to attorney fees under R.C. 149.43 in a public records mandamus action when there is no evidence **that the party actually paid or is obligated to pay attorney fees.**"¹⁷ The affidavit in this case demonstrates that Relator, Ms. Schiffbauer, a former student and now recent college graduate, never actually paid or will herself pay legal fees. Because there is no evidence that Relator, the party to the lawsuit who is seeking reimbursement, actually paid any legal expense, Relator is not entitled to reimbursement for expenses Relator never actually paid.

¹⁷ See: *State ex rel. Beacon Journal v. Akron* (2004), 104 Ohio St. 3d 399, 2004 Ohio 6557, 819 N.E.2d 1087. See also: *State, ex rel. Citizens v. Register* (2007), 116 Ohio St. 3d 88, 2007-Ohio-5542, 876 N.E. 2d 913 "Like an award for attorney fees under R.C. 149.43, an award of attorney fees as a sanction for a discovery dispute must actually be incurred by the party seeking the award."

D. COURTS SHOULD NOT PUNISH THE UNIVERSITY FOR TAKING A REASONABLE STANCE ON AN UNSETTLED LEGAL ISSUE

This Court has consistently held that: “courts should not be in the practice of punishing parties for taking a rational stance on an unsettled legal issue.”¹⁸ This Court has consistently held that requests for attorney fees should be rejected when the respondent’s position was reasonable based on the Court’s prior case law.¹⁹ In the present case, the Relator already had the records sought which were always available at the Westerville Mayor’s Court, Westerville Municipal Court and/or Westerville Police Department.

Despite the fact Relator already had the records sought by the lawsuit, those records were always available to the public, the Complaint was filed to obtain a Court ruling in an unsettled area of law. As demonstrated by pending legislation in the General Assembly to amend the existing PRA statute to provide that private University police departments are subject to the PRA, the statutory and case law on this point was unsettled - that’s why Relator’s lawsuit was filed when Relator and the public already had access to the records. As held by this Court in *Olander, supra*, Respondents should not be punished for taking a reasonable stance on a complex and unsettled legal issue.

III. CONCLUSION

It must be emphasized that Relator *already had* the records in this case and the records were *always available* to Relator and other members of the public from public offices with R.C. 2744 immunity from defamation or libel *per se* claims at the Westerville Municipal Court, Westerville Mayor’s Court and/or Westerville Police Department. Because the records were

¹⁸ See: *State, ex rel. Olander v. French* (1997), 79 Ohio St.3d 176, 197 Ohio 171, 680 N.E.2d 962.

¹⁹ See: *State, ex rel. Cincinnati Enquirer v. Ronan* (2010), 127 Ohio St.3d 236 , 2010 Ohio 5680, 938 N.E.2d 347.

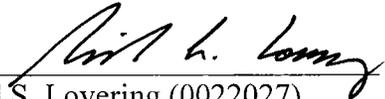
already available to Relator, this lawsuit was apparently filed to address the then unsettled legal issue of whether a private University's police department was subject to the PRA. In addition, the affidavit provided in support of the pending motion for expenses confirms that Relator herself has never actually paid a legal bill in this case and is therefore not entitled to reimbursement for legal bills Relator herself has never actually paid.

The University reasonably believed based on the advice of the Assistant Attorney General and two law firms that it was a private University and not subject to the PRA under the analysis of the dissent in this Court's divided 4-3 decision. Similarly, the General Assembly consisting of well-informed public officials in proposing HB 411 and 429 similarly believed that the current statutory and case law was unsettled and not clear. The recent contrary decision of the Indiana Superior Court regarding Notre Dame's police department's records demonstrates that reasonable well informed individuals in a sister state could reach different conclusions in this previously unsettled area of law. The public interest in the privacy expectations of its students codified in FERPA and the Clery Act as well as in OCR guidance was also necessarily a factor in the University's reasoning in response to a request for records that Relator already had. As this Court has repeatedly held, "[c]ourts should not be in the practice of punishing parties for taking a rational stance on an unsettled issue."²⁰

²⁰ *Olander, supra, Toledo Blade, supra, Cincinnati Enquirer, supra and Ronan, supra.*

For the foregoing reasons, the University respectfully requests that Relator's Motion for Statutory Damages and Fees be overruled.

Respectfully Submitted,



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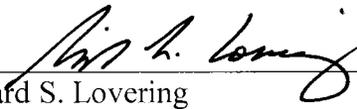
Counsel for Respondents,

Larry Banaszak and Robert M. Gatti

CERTIFICATE OF SERVICE

A copy of the foregoing *Respondents' Memorandum Contra Relator's Motion for Statutory Damages and Attorney Fees* has been sent via the court's electronic system and by regular U.S. mail, postage pre-paid on June 22, 2015, to:

John C. Greiner
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1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157
Counsel for Anna Schiffbauer


Richard S. Lovering

IN THE SUPREME COURT OF OHIO

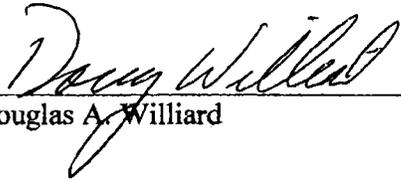
STATE OF OHIO ex rel.	:	
Schiffbauer, et al.	:	Case No. 2014-0244
	:	
Relator,	:	
	:	ORIGINAL ACTION IN
v.	:	MANDAMUS
	:	
Larry Banaszak, et al.	:	
	:	
Respondent.	:	

AFFIDAVIT OF DOUGLAS A. WILLIARD

I, Douglas A. Williard, do hereby declare and state as follows based on personal knowledge:

1. I am the former Deputy Chief at Otterbein University Police Department and have served in that position from October 14, 2008 to August 13, 2013. My duties and responsibilities as Deputy Chief included overseeing the daily operations of the Otterbein Police Department.
2. On November 2, 2011, former Otterbein University Police Sergeant, Robert Reffitt and I attended a 3-hour class presented by the Ohio Attorney General’s Office titled, “Sunshine Law.”
3. We attended because we wanted to obtain the Ohio Attorney General’s legal guidance and direction concerning our legal obligations, if any, under the Ohio Public Records Act. The Presenter was introduced as the Assistant Ohio Attorney General Robert Moorman who handles Ohio Public Records Act inquiries.
4. The Assistant Ohio Attorney General, Attorney, Robert Moorman, started the class by stating, “we’ll cover the exemptions to Ohio’s Sunshine Law first.” He then proceeded to cover several exemptions.
5. One exemption Assistant Attorney General Moorman talked about was a case called, *Oriana House v. Montgomery*, which he stated established a “functional equivalency” test to determine whether private agencies/companies that receive public funds are subject to the Public Records Act.
6. As Assistant Attorney General Robert Moorman explained the case law and explained the functional equivalency standard, I thought at the end of the explanation he would say the Ohio Supreme Court found that *Oriana House* was a public institution and would have to submit to the Ohio Public Records Act, especially since he explained about the millions of public funds the agency received.

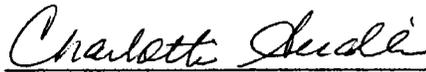
Further affiant sayeth not.



Douglas A. Williard

STATE OF OHIO)
)
COUNTY OF FRANKLIN) ss:

Sworn to before me a Notary Public in and for the State of Ohio and subscribed in my presence by the said Douglas A. Williard on this 21 day of October, 2014.



Notary Public, State of Ohio
My Commission Expires: 6-16-2015



CHARLOTTE SEALE
Notary Public, State of Ohio
My Commission Expires 6-16-2015
Recorded in Pleinaway County

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

ST. JOSEPH SUPERIOR COURT
CAUSE NO. 71DO7-1501-MI-00017

ESPN, INC. AND PAULA LAVIGNE,)
)
PLAINTIFFS)
)
VS)
)
UNIVERSITY OF NOTRE DAME)
SECURITY POLICE DEPARTMENT, A)
DEPARTMENT OF THE UNIVERSITY)
OF NOTRE DAME DU LAC,)
)
DEFENDANT)

- FILED -
APR 20 2015
Clerk
St. Joseph Superior Court

ORDER ON CROSS MOTIONS FOR DISMISSAL
AND JUDGMENT ON THE PLEADINGS

This cause came on for hearing on April 1, 2015, on Motions under Trial Rule 12(C) filed by both sides. First, on February 12, 2015, a Motion for Dismissal and Judgment on the Pleadings (the "Notre Dame Motion") was filed by the Defendant herein, denominated as "The University of Notre Dame Security Police Department, a Department of The University of Notre Dame Du Lac" (hereinafter referred to as "Notre Dame"). Thereafter, on March 10, 2015, Plaintiffs, ESPN, Inc., and Paula Lavigne (collectively referred to herein as "ESPN"), filed their Cross-Motion for Judgment on the Pleadings (the "Cross-Motion"). ESPN appeared at the hearing by its counsel of record, Attorneys James Dimos and Jennifer A. Rulon. Notre Dame likewise appeared by its counsel of record, Attorneys Damon R. Leichty and Georgina D. Jenkins.

ANALYSIS AND DISCUSSION

A. Introduction and Trial Rule 12(C).

The Court makes no findings of fact in a matter such as this. "The interpretation of a statute is a question of law." *In Re: Custody of G.J.*, 796 N.E.2d 756, 760 (Ind.Ct.App. 2003); and *Indiana Family & Social Services Administration v. Radigan*, 755 N.E.2d 617 (Ind.Ct.App. 2001). However, the Court does note that both parties have attempted to introduce facts outside of the pleadings. Those facts include the content of Notre Dame's website, whether or not Notre Dame maintains records responsive to ESPN's records request, and that ESPN has made similar requests to another university. None of those matters are properly before the Court on the pending Motions. Accordingly, those matters have not been considered by the Court in reaching its decision.

The Court views this as a straightforward (but certainly not a simple) matter of statutory construction. The job of this Court is to interpret and construe the statute in question, not to legislate. "If a statute is unambiguous, that is, susceptible to but one meaning, we must give to the statute its clear and plain meaning." *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002).

Both sides have thoroughly and effectively briefed and argued their respective positions, and they have presented to the Court an extremely interesting case. The Court expected skilled advocacy by both sides – and neither side has disappointed.

By the Notre Dame Motion and the Cross-Motion, both parties seek the entry of a judgment on ESPN's Complaint pursuant to Trial Rule 12(C) of the Indiana Rules of Trial Procedure. Trial Rule 12(C) reads as follows:

(C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A Trial Rule 12(C) motion attacks the legal sufficiency of the pleadings. See *Midwest Psychological Center, Inc. V. Indiana Depart. of Admin.*, 959 N.E.2d 896, 902 (Ind.Ct.App. 2011). In considering a Trial Rule 12(C) motion, the Court must accept as true all well-pleaded facts in the complaint and base its decision solely on the pleadings. See *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010). Judgment on the pleadings is appropriate only when "the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations therein." *Midwest Psychological Center, Inc.*, 959 N.E.2d, at 902.

B. Interpretation of Access to Public Records Act.

The University of Notre Dame is a private university located in St. Joseph County, Indiana. It has been sued in this Court by ESPN and ESPN's reporter because Notre Dame allegedly has records that ESPN wants and that Notre Dame has withheld. ESPN alleges that Notre Dame has to produce the requested records under Indiana law because Notre Dame exercises certain "police powers."

Specifically, ESPN's Complaint asks the Court to require Notre Dame to produce records of the University of Notre Dame Security Police Department ("NDSP"), which ESPN alleges is a "university police force." ESPN claims that Notre Dame and NDSP are required to produce the requested records pursuant to Indiana's Access to Public Records Act ("APRA") contained in Indiana Code §5-14-3-1 *et seq.* The Complaint

alleges also that NDSP is a "public law enforcement agency" under APRA. In fact, ESPN uses that term no less than seven (7) times in its Complaint, even though that term is not contained in APRA.

As an initial matter, it is noted that Notre Dame's campus police officers do not constitute a separate legal entity. The enabling statute that authorizes Indiana's private colleges and universities to appoint campus police officers, only allows the colleges and universities themselves to do so. See Indiana Code §21-17-5-1 *et seq.* It does not authorize the colleges and universities to establish separate and distinct legal entities to exercise police powers.

In fact, the statute does not use the term "campus police department," "campus police force," or any similar term. All it does is authorize the colleges and universities themselves to appoint police officers with certain enumerated powers. If Notre Dame is a "public agency" because it appoints police officers, it is a public agency, period. Thus, the question raised by ESPN's Complaint is really whether the University of Notre Dame, the entire University of Notre Dame, is now required to produce all of its records (such as academic, business and financial records) simply because it appoints campus police officers.

Any analysis of the pending motions must begin with the quite recent decision of our Indiana Supreme Court in *Evansville Courier & Press v. Vanderburgh County Health Department*, 17 N.E.3d 922 (Ind. 2014), which held that:

APRA is intended to ensure Hoosiers have broad access to most government records:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that

all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

Ind. Code §5-14-3-1(2010). Thus, we apply a presumption in favor of disclosure, and the burden rests upon the Department to rebut that presumption. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991). *Evansville Courier & Press*, at 928-929.

The Court remains ever mindful of the important policy reflected in APRA and the need to interpret the statute consistent with that policy. Yet, the *Evansville Courier* decision does not really provide much guidance in determining whether a private entity can be made subject to the production requirements of APRA. *Evansville Courier* stands for the proposition that APRA is to be "liberally construed" in determining what records must be produced by a governmental agency. It cannot be taken as authority for the proposition that APRA must be "liberally construed" in order to cause private citizens to be subject to APRA.

APRA only applies to records of an entity or organization that is a "public agency." That term is defined in the various paragraphs of Indiana Code §5-14-3-2(n). Notre Dame initially focuses on the part of the definition contained in Indiana Code §5-14-3-2(n)(6), which provides that a public agency includes:

Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the

Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

Notre Dame contends that it does not fall within that statutory definition. The Court agrees. Notre Dame is clearly not “an agency or a department of any level of government.”

However, the inquiry does not end there. The definition of “public agency” also includes entities and organizations described in the other paragraphs of subsection (n). ESPN argues that paragraph (1) of that subsection [I.C. §5-14-3-2(n)(1)] is the critical paragraph. It provides that a “public agency” includes:

(1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

ESPN’s position, in essence, is that Notre Dame exercises the state power of providing police services. While the police officers appointed by Notre Dame may not be exactly like other police officers, they do have the authority to exercise the most critical police functions on and around the Notre Dame campus, including the authority to investigate criminal activity and make arrests. *See* Indiana Code §21-17-5-4(a).

Our Indiana Supreme Court has recognized that private universities who appoint campus police officers are “state actors” as to the actions of those officers for constitutional law purposes. “A private entity is deemed a state actor when the state delegates to it a traditionally public function.” *Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003). In that case, our Indiana Supreme Court held that the campus police department operated by Butler University was a “state actor” for purposes of determining the constitutional limits on the search and seizure powers of that department.

The powers given to officers appointed by Indiana's private colleges and universities are significant. "The delegation of police powers, a governmental function, to the campus police buttresses the conclusion that the campus police act under the color of state authority." *Henderson v. Fisher*, 631 F.2d 1115, 1118 (3rd Cir. 1980), quoted with approval in *Finger v. State*, at 532. However, it does not follow that Notre Dame is a public agency under APRA simply because NDSP is a "state actor" for constitutional law purposes. *Kentner v. Indiana Public Employers' Plan, Inc.*, 852 N.E.2d 565, 573-74 (Ind.Ct.App. 2006).

The Indiana Legislature delegated to the governing boards of Indiana's accredited private colleges and universities the authority to appoint officers with significant police authority. See Indiana Code §§21-17-5-3, 21-17-5-4, and 21-17-5-7. However, the powers exercised by those officers are not part of the executive, administrative, judicial or legislative power of the state. Rather, because the Legislature has granted those powers to private third parties, namely the "governing board" of each of the colleges and universities, they are powers granted by the state. The governing boards are "state actors" for purposes of determining the constitutional limits of such power. But that does not cause them to become "public agencies" under APRA. *Id.* at 572. APRA is a statute. Interpreting that statute does not involve the same analysis as imposing and defining the limits of police powers under the United States Constitution. They are simply two (2) different concepts. ESPN is not alleging a constitutional right to the records.

ESPN's position is that a private entity that has been authorized by the state to exercise a power that the state has traditionally exercised, such as police powers, automatically becomes a "public agency" under APRA. The Public Access Counselor

essentially agreed with that conclusion when it issued his opinion dated October 31, 2014. The only paragraph of Indiana Code §5-14-3-2(n) cited by the Public Access Counselor was paragraph (n)(1). The Public Access Counselor stated that he was "not comfortable" that a private organization could have police powers and not be subject to APRA. He then concluded that "the Notre Dame Security Police Department should be considered a public law enforcement agency subject to the Access to Public Records Act." (emphasis added)

Maybe the Public Access Counselor is correct that Notre Dame should be covered by APRA with respect to the activities of its police officers. But the question before the Court is whether it is covered. It may be hard to argue with the policy that an entity exercising police powers should have to disclose its records pertaining to such actions. However, an entity falling within the definition of a "public agency" is an agency subject to APRA disclosure for all purposes. There is no "to the extent of" language in paragraph (n) (1). It is difficult to fathom that the Indiana Legislature, without directly saying so, would intend the University of Notre Dame, Taylor University, Valparaiso University (and on and on) to have to produce pursuant to APRA all of their records concerning any matter whatsoever to anyone who asks, simply because those private institutions availed themselves of the Legislature's invitation to appoint campus police officers.

The Court recognizes that ESPN is not asking for all of the records of Notre Dame; only those records pertaining to police activities. The Court is not unnecessarily looking for a "slippery slope." Rather, recognizing the expansive effect of ESPN's interpretation of APRA is instructive as to the Legislature's intent. ESPN's position

would lead to results that cannot be attributed to the Legislature absent a clear expression by the Legislature.

Both parties have devoted a great deal of time in their respective briefs to the concept of "legislative acquiescence." Between 2003 and 2011, three (3) different Public Access Counselors issued opinions to the effect that private colleges who appoint campus police officers are not public agencies under APRA. Notre Dame argues that since the Legislature did not amend APRA after those opinions were issued, the Legislature should be deemed to have intended the result reflected by the opinions. While Notre Dame has cited no case law or other authority directly applying the doctrine of legislative acquiescence to an advisory opinion given by the Public Access Counselor, its point is well taken. If the Legislature thought that those three (3) Public Access Counselors were wrong, and that private colleges and universities in Indiana were intended to be public agencies under APRA, the Legislature has had since 2003 to codify that intent. It has not done so.

It may have been preferable if APRA expressly included or excluded private colleges and universities and/or their campus police departments in defining public agency. Nevertheless, the statute is clear enough. The Legislature authorized private colleges and universities to appoint officers who exercise certain police powers. Therefore, Notre Dame is not exercising an executive, administrative, judicial or legislative power of the state. It is exercising powers granted by the state.

The Court shares the Public Access Counselor's discomfort with the notion that a private party can exercise police powers without providing to the public the access to records required by APRA. The Court is similarly uncomfortable with the notion that a

private entity could be subject to APRA for all purposes without any clear expression that the Legislature intended such a result. Yet, ultimately this case is not about "comfort." It is about what the statute says. Over an eight (8) year period from 2003-2011, three (3) different Public Access Counselors interpreted the statute, on three (3) separate occasions, as not applying to private colleges and universities that appoint police officers. Those opinions were correct when given, and they remain correct today.

ESPN's position assumes that the Indiana Legislature has the constitutional authority to require a private person or entity that is not publicly funded to produce its records under APRA. Such a requirement would certainly give rise to grave concerns about the right to privacy and the right to be free from unreasonable searches and seizures. However, those concerns do not have to be addressed in this order. The Indiana Legislature has not attempted to impose on private colleges and universities the obligation to comply with APRA. The Court will not substitute its judgment for that of the Legislature.

Perhaps ESPN would argue that APRA should be narrowly interpreted as only applying to private colleges with respect to their campus police activities. Perhaps that is why it used the term "public law enforcement agency" so frequently in its Complaint. However, an entity either is or is not a public agency. The Legislature only authorized the colleges and universities themselves to appoint police officers. The Court cannot rewrite the statute so that it applies to certain activities of an entity, and not to others.

Even with the concerns about privacy and unreasonable searches and seizures discussed above, the Legislature may very well have the authority to pass a law that would require public access to records under APRA to the extent that the records pertain

to the exercise of state authorized police powers. After all, the colleges and universities are not obligated to appoint police officers. However, as things now stand, there is nothing in the language of the statute that could be interpreted as limiting access to the records of a private university to only those pertaining to police activities. Now, after all the years that APRA has been in effect and generally understood to not apply to private universities, it would not be appropriate for the Court to, in essence, re-write the statute. The Indiana Legislature has had many years to expressly provide that Indiana's private colleges and universities are subject to APRA. It has never done so. This Court will not strain the language of the statute in order to do what the Legislature has not, even though there are indeed persuasive reasons why the statute should be amended to read the way ESPN desires.

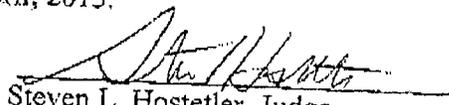
DECISION

Perhaps this case will cause the Indiana Legislature to consider this important matter. ESPN makes persuasive policy arguments. However, based on how the statute now reads, Notre Dame's Motion must be, and hereby is, granted and sustained. Pursuant to Trial Rule 12(C) the Complaint filed by ESPN on January 15, 2015, is hereby dismissed. The Cross-Motion filed by ESPN is denied and overruled.

Copies of this Order sent to Attorneys James Dimos and Jennifer A. Rulon, and to Attorneys Damon R. Leichty and Georgina D. Jenkins, all by regular mail.

All of which is ordered this 20th day of April, 2015.

Distribution:
Clerk
J. Dimos/J. Rulon
D. Leichty/G. Jenkins


Steven L. Hostetler, Judge
St. Joseph Superior Court

STATE OF INDIANA)
)
ST. JOSEPH COUNTY)

ST. JOSEPH SUPERIOR COURT

ESPN, INC. AND PAULA LAVIGNE,)
)
Plaintiffs,)

v.)

CAUSE NO. 71D07-1501-MI-0017

UNIVERSITY OF NOTRE DAME)
SECURITY POLICE DEPARTMENT,)
a department of the University of Notre)
Dame du Lac,)

Defendant.)

- FILED -

FEB 12 2015

St. Joseph Superior Court Clerk

**DEFENDANT'S BRIEF SUPPORTING DISMISSAL
AND JUDGMENT ON THE PLEADINGS**

Indiana's Access to Public Records Act (APRA) concerns the affairs of public agencies, not the affairs of private universities. Indiana's General Assembly has the prerogative to legislate the scope of APRA. Although the General Assembly has amended APRA many times since it was first passed in 1983, including as recently as 2013, it has never included private universities or their campus police departments within the scope of that law.

For more than a decade, the Indiana Office of Public Access Counselor (OPAC) has issued consistent advisory opinions to the effect that private higher education institutions and their campus police departments are *not* subject to APRA. *See* Advis. Ops. 3-FC-108 (Taylor University); 09-FC-9 (Valparaiso University); 10-FC-304 (University of Notre Dame) [Answer Exs.3-5]. ESPN neglects to mention this point in its complaint. One of those prior advisory opinions specifically concerned the University of Notre Dame Security Police Department (NDSP) and concluded that NDSP was not a "public agency" subject to APRA. The University of Notre Dame has proceeded on this advice spanning more than a decade and its reasonable construction of the law.

The General Assembly has been content with APRA's scope as it concerns private universities. It has not changed APRA in response to these three OPAC opinions. Many of the 31 private universities and colleges who make up the Independent Colleges of Indiana (ICI) have followed this

lead as well. Lobbyists, including the Hoosier State Press Association, have sought to expand Indiana's public access laws. Despite this lobbying effort and despite the 11 legislative sessions that have come and gone since OPAC first opined in 2003 that a private university police department in this state was not a "public agency" and not subject to APRA, the General Assembly has never amended APRA to include campus police departments within its scope.

That should tell us all something—that OPAC and private universities have had it right for over a decade and just as the legislature intended. *See Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 715 N.E.2d 351, 358 (Ind. 1999) ("A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts."). It is the job of our courts to enforce that intent. There has not been a change in the law that would support the decision of a new Public Access Counselor (PAC) (appointed in 2013) to suddenly reverse course from three different predecessor PACs.

APRA's plain language and its reasonable construction over many years should control. This case is particularly suited to this Rule 12(C) motion because APRA's interpretation is a question of law. *See Justice v. Am. Family Mut. Ins. Co.*, 4 N.E.3d 1171, 1175 (Ind. 2014). Because NDSP is not a "public agency" subject to APRA, ESPN's case should be dismissed.

BACKGROUND

A. The Balance between ESPN Scrutiny and Individual Privacy.

Notre Dame values appropriate transparency but also individual student privacy. Both Congress and the Indiana General Assembly have passed laws that balance these interests, and they are the bodies best situated to do so. Notre Dame complies with state and federal law in handling its documentation about student, police, and university affairs.

For instance, under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, commonly known as the Clery Act, colleges and universities across the United States, including Notre Dame, publish an annual security report about campus crime statistics to students, employees, and the U.S. Department of Education. *See* 20 U.S.C. § 1092(f). Under the Clery Act, Notre

Dame also maintains a crime log—accessible to the public and similar to (though not the same as) the one sought by ESPN under state law—documenting the “nature, date, time, and general location of each crime” and its disposition, if known. *See* 20 U.S.C. § 1092(f)(4)(A). Federal law further requires Notre Dame to disclose crime statistics for incidents that occur on campus or in unobstructed public areas immediately adjacent to or running through campus. *See* 20 U.S.C. § 1092(f)(1)(F). Notre Dame must also report statistics for liquor, drug, and illegal weapons violations if an arrest was not made and the matter was referred to campus officials for disciplinary action. *See* 20 U.S.C. § 1092(f)(1)(F)(IX).

Under federal law then, Notre Dame already publicly discloses considerable information concerning reported campus incidents or crime, and does so without the need of any mandate from Indiana state law (APRA). The Clery Act applies to universities and campus police departments, but not to typical non-collegiate police departments. No doubt over the course of the last decade, as OPAC issued three advisory opinions that private universities were not covered by APRA, the General Assembly, or at least members who follow higher education issues, have appreciated that significant information was already being disclosed by private universities under federal law.

The quest for public scrutiny cannot disregard the important interests of individual privacy. Indeed, the importance of individual privacy has long-standing roots in our constitutional history. When it comes to university students, that interest is robust. Under the Family Educational Rights and Privacy Act of 1974 (FERPA), for example, Congress has made a concerted effort to safeguard a student’s right to privacy. FERPA protects “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A). Universities generally may not disclose those records without the student’s consent.

The specific contours of these federal laws (Clery Act and FERPA) are not the issue for this motion; but they help demonstrate that there always has been a fundamental balance between individual privacy and public disclosure—and that balance has been appropriately managed at the legislative level through the complementary efforts of Congress and Indiana’s General Assembly. APRA serves a laudable purpose, when used legitimately, by ensuring that *public agencies* are not acting

behind a shroud of secrecy. Even then, in a society where an open government is considered essential to a properly functioning democracy, not every iota of information is subject to public scrutiny. That principle resounds with even more force when ESPN (advancing a sports media purpose) seeks to subject private institutions, such as Notre Dame or its campus police department, to a law intended for governmental scrutiny.

B. ESPN Requests Records on 275 Student-Athletes at Notre Dame.

On September 14, 2014, before ESPN made any requests to NDSP, before any formal complaints had been submitted to OPAC, and before any reasoned position statements had been presented to OPAC, the new PAC was quoted in the newspapers with the Hoosier State Press Association, declaring that if “they are under the badge, they are going to be a public law enforcement agency.” See www.southbendtribune.com/news/local/should-notre-dame-police-adhere-to-public-records-law/article_e62a859c-3bf1-11e4-bcea-0017a43b2370.html. He did so despite three prior and contrary opinions from OPAC concluding that private university police departments were not subject to the law.

On September 19, ESPN sent a request for records under APRA to NDSP, seeking incident reports about 275 student-athletes whether they had been named as a victim, suspect, witness, or reporting party [Compl./Answer ¶ 7].¹ ESPN claimed the request was not a “fishing expedition” and was instead part of an analytical study.² Among other reasons, Notre Dame denied the request, noting that NDSP was not a “public agency” subject to APRA [Compl./Answer ¶ 8].

ESPN filed a formal complaint (14-FC-239) with OPAC [Compl. ¶ 9]. On October 31, Indiana’s new PAC issued an opinion advising that NDSP was a “public law enforcement agency” under APRA [Compl. ¶10 & Ex.1; Answer ¶2 Exs.3-5]. Noting that NDSP had been relying on over a decade of guidance from OPAC, the opinion further stated that it was “strictly advisory” since NDSP

¹ This request, and those that followed, were not always stated with reasonable particularity, but ESPN appeared to target student-athletes.

² It has been reported that ESPN also requested such records about 360 FSU student-athletes in September 2014, likewise claiming it was not a “fishing expedition.” See, e.g., <http://collegespun.com/acc/florida-state/espn-requested-police-records-for-the-names-of-360-florida-state-athletes>. The deadline for responding to the requests preceded the game between Notre Dame and Florida State held on October 18, 2014.

had functioned as a “private organization,” and that NDSP would be considered a public law enforcement agency by OPAC “for future public access requests and the creation of documentation found at Ind. Code § 5-14-3-5(c)” (the APRA provision relating to the creation of a daily log by public law enforcement agencies) [Compl. Ex.1].

On November 4, ESPN sent a new request to NDSP, asking that NDSP consider the prior request “withdrawn” and now seeking incident reports, including officer narratives, from NDSP relating to 275 student-athletes, whether they were identified as a suspect, person of interest, or arrestee [Compl./Answer ¶ 12]. ESPN again claimed this was not a “fishing expedition.” On November 11, Notre Dame denied the request, noting that NDSP was not a public agency under APRA, that the substantial weight of advisory opinions from OPAC concurred in this view, and that, even if the latest advisory opinion was given due regard, by its own language it applied only to the prospective creation of documents, which NDSP did not have [Compl./Answer ¶13].

On November 20, ESPN sent a new request to NDSP, expressing its concern about the “technical wording” of its prior request [Compl./Answer ¶14]. This third request sought arrest records, incarceration records, and all records that refer or relate to each identified student-athlete (out of 275 names) who appeared on NDSP’s “daily log” created under APRA, Ind. Code § 5-14-3-5 [*Id.*]. No longer did ESPN claim that this was not a “fishing expedition.” Of course, outside the Clery Act crime log that Notre Dame had already published to the public, NDSP had no other daily log to share as it had never needed to create such a log; it had never been subject to APRA [*Id.*]. Notre Dame denied the request in the same manner that it had before [*Id.*].

On December 8, ESPN filed another formal complaint with OPAC (14-FC-306) [Compl. ¶15]. On January 5, 2015, the new PAC again noted that NDSP had been acting in reliance on three prior OPAC opinions and that the new position was not “compulsory” [Compl. Ex.2 p.2]. OPAC expressed its advice that NDSP should be treated as a public law enforcement agency, pointing out to ESPN that a “fair amount of information” sought by ESPN would be exempted from disclosure as “investigatory records” [*Id.*]. ESPN had sought a conclusive determination that NDSP had violated APRA, but by law

OPAC lacked the authority to issue such a determination. *See, e.g.*, Ind. Code § 5-14-4-10(6) (permitting OPAC to issue “advisory opinions”).

C. ESPN Files Suit to Have NDSP Declared a Public Law Enforcement Agency.

On January 15, 2015, ESPN filed suit claiming that NDSP was a “public law enforcement agency” under APRA and that it should be compelled to produce records under APRA [Compl. ¶5]. Notre Dame answered the complaint on February 12, 2015 and now seeks to have judgment entered on the pleadings under Rule 12(C). APRA defines a public law enforcement agency as follows:

an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

Ind. Code § 5-14-3-2(n)(6). Noticeably absent from this definition is any reference to a police agency of a private, non-governmental entity, much less that of a private university. NDSP is not an agency or a department of any level of government.

STANDARD

A Rule 12(C) motion attacks the legal sufficiency of the pleadings. *See Midwest Psychological Center, Inc. v. Indiana Dept. of Admin.*, 959 N.E.2d 896, 902 (Ind. Ct. App. 2011). In ruling on such a motion, a trial court must accept as true all well-pleaded facts in the complaint and base its decision solely on the pleadings. *See Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010). Judgment on the pleadings is appropriate when “the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations therein.” *Midwest*, 959 N.E.2d at 902.

For a Rule 12(C) motion, a trial court may review the complaint, answer, and attached exhibits. *See* Ind. Trial R. 9.2(A), 10(C), and 12(C); *see also Consolidated Ins. Co. v. Nat'l Water Servs., LLC*, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013) (pleadings “consist of a complaint and an answer . . . [and] any written instruments attached to a pleading, pursuant to Ind. Trial Rule 9.2”); *Gregory and Appel, Inc. v. Duck*, 459 N.E.2d 46, 49-50 (Ind. Ct. App. 1984) (letter and two contracts attached to complaint held

part of the pleadings). In addition, the “factual allegations of the answer are taken as true, to the extent they have not been denied or do not conflict with the complaint.” *Blue Rhino Global Sourcing, Inc. v. Well Traveled Imports, Inc.*, 888 F. Supp. 2d 718, 721 (M.D.N.C. 2012); *see also Duck*, 459 N.E.2d at 49-50; *Ocasio v. Turner*, 19 F. Supp.3d 841, 844 (N.D. Ind. 2014).

ARGUMENT

A. **ESPN Cannot Meet its Burden of Establishing that NDSP is a “Public Agency” under APRA Given Multiple Interpretations of the Statute to the Contrary.**

Only entities that fall within the definition of “public agency” are subject to APRA’s requirements. *See* Ind. Code § 5-14-3-1 *et seq.*; *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1023 (Ind. Ct. App. 1999). This is not the usual case in which a known public agency has wrongfully denied access to public records. For more than 30 years, and certainly well-settled for more than a decade, private university police departments have not been subject to APRA [Answer ¶2, Exs.3-5]. There has been no intervening change in the law that justifies an abrupt shift on this issue. ESPN has the burden of proving that an otherwise private institution is a “public agency” within APRA’s meaning. *See Indianapolis Conv. & Visitors Ass’n v. Ind. Newspapers*, 577 N.E.2d 208, 212 (Ind. 1991). ESPN cannot meet this burden on the pleadings, so its claim should be dismissed.

B. **This Case is Barred by the Estoppel Doctrine of Legislative Acquiescence.**

The Indiana Supreme Court has long enforced the doctrine of legislative acquiescence. The “doctrine of legislative acquiescence is an estoppel doctrine designed to protect those who rely on a long standing administrative interpretation.” *Citizens Action Coalition of Indiana v. Northern Indiana Publ. Serv. Co.*, 485 N.E.2d 610, 616 (Ind. 1985). “A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts.” *Indiana Bell*, 715 N.E.2d at 358.

By statute, OPAC is charged with several duties, including the duty to “issue advisory opinions to interpret the public access laws upon the request of a person or a public agency” and to “make recommendations to the general assembly concerning ways to improve public access.” Ind. Code § 5-

14-4-10(6,7). Despite over a decade of administrative opinions from OPAC (three different Public Access Counselors) concluding that NDSP and other private university police departments are not “public agencies” under APRA, and despite passing other amendments to the law in nearly every annual legislative session, the General Assembly has never changed APRA to encompass private university police departments.

Legislative acquiescence is the doctrine that says those charged with administrative interpretation “got it right.” *See Robbins v. Baxter*, 799 N.E.2d 1057, 1062 (Ind. 2003) (“In reaching this conclusion, we note that ten years have passed since [the original decision] and it is likely that legislative acquiescence has set in.”). In 2003, for instance, an individual sought a variety of records from Taylor University’s Office of Campus Safety, created under the same law as NDSP. OPAC there found that a private university police department was not a “public agency” under APRA: “Under the plain language of the statute, a ‘law enforcement agency’ must both exist as an agency or office of government and engage in the functions identified.” *Advis. Op. 3-FC-108* at 2-3. OPAC went on to conclude that a private university police department was not a public agency under other definitions of that term within APRA. *See id.* at 3-5.

In 2009, OPAC revisited this advisory opinion in response to a similar request to Valparaiso University’s police department for incident reports related to its students. In that opinion, OPAC again concluded that neither Valparaiso University nor its police department were public agencies for purposes of APRA. *See Advis. Op. 09-FC-9* at 1-2.

Thereafter, in 2011, OPAC advised that NDSP was not a public agency subject to APRA. OPAC there found that, while NDSP had been given the option of broad police powers, such powers resided within the control and authority of the University’s Board of Trustees, not the government. *See Advis. Op. 10-FC-304* at 3. As written, APRA authorized public records requests only from law enforcement agencies of the government or political subdivisions, not all law enforcement departments. *See id.* Much like the point made here, OPAC concluded that, “[i]f the General Assembly’s intent were otherwise, it has passed on several opportunities to amend the APRA and clarify it to include private universities’ police departments. Since 2003, the APRA has been amended in some fashion during

nearly every annual legislative session, but the General Assembly has not seen fit to amend the APRA to supersede this office's advisory opinions by explicitly defining private universities' police department as public agencies." *Id.*

Without calling it such, OPAC was observing the effect of legislative acquiescence. *See also Breaston v. State*, 907 N.E.2d 992, 995 (Ind. 2009) (noting the General Assembly had not changed the law in more than two decades since prior interpretation); *Fratus v. Marion Comm. Sch. Bd. of Trustees*, 749 N.E.2d 40, 46 n.3 (Ind. 2001) ("[T]he IEERB has interpreted the Act as including the duty of fair representation as an unfair practice and has routinely adjudicated such claims. If the General Assembly were dissatisfied with IEERB's long-standing interpretation, we presume it would have amended the Act accordingly.") (citations omitted); *Indiana Dept. of Revenue v. Glendale-Glenbrook Assocs.*, 429 N.E.2d 217, 219 (Ind. 1981) ("The legislature took no action during this period [7 years] to amend the statute and therefore must be deemed to have acquiesced in the exemption [authorized by an administrative agency]. Such acquiescence is binding and controlling in this case."); *Fishburn v. Indiana Publ. Retirement Sys.*, 2 N.E.3d 814, 827 (Ind. Ct. App. 2014) ("Based upon the General Assembly's inaction in the face of the INPRS's interpretation of [the statute], the General Assembly is deemed to have acquiesced in INPRS's interpretation of the disability benefit statutes and we must presume that INPRS's interpretation was the meaning intended by the General Assembly."); *State Pub. Emples. Retirement Fund v. Shepherd*, 733 N.E.2d 987, 990 (Ind. Ct. App. 2000) ("Accordingly, based upon the General Assembly's inaction in the face of the PERF's Board implementation of the Plan, a presumption arises that the General Assembly has acquiesced in the PERF Board's interpretation. We therefore hold that the General Assembly is deemed to have acquiesced in the PERF Board's construction of IC 5-10-5.5-10(b), and we must presume that the PERF Board's construction was the meaning intended by the legislature."); *State Bd. of Accounts v. Indiana Univ. Foundation*, 647 N.E.2d 342, 348-51 (Ind. Ct. App. 1995) ("legislature's acquiescence in the [prior decisions] indicates its approval of a construction of the private gift statutes that private gifts made to Indiana University retain their character as private funds and are not public funds").

If the 2003 and 2009 opinions were not enough, the 2011 opinion all but invited a change if the interpretation was not right, but none has occurred. The General Assembly has adopted multiple amendments to APRA over the years specific to how it defines “public agency,” including “law enforcement agency,” but it has never expanded the scope of “law enforcement agency” or “public agency” to include private university police departments.³ *See, e.g.*, Pub. Law No. 54-1985; P.L.341-1989; P.L.277-1993; P.L.50-1995; P.L.204-2001; P.L.90-2002; P.L.1-2006; P.L.179-2007; P.L.227-2007; *see also* *Patrick v. Miresso*, 848 N.E.2d 1083, 1086 (Ind. 2006) (“[W]e observe that the immunity provisions . . . have been amended eleven times since [a decision] was handed down in 1993, but without any change that would alter the outcome in [that decision]. The continued viability of this precedent is thus further supported by the doctrine of legislative acquiescence.”).

What is more, the General Assembly has amended the definition of “law enforcement agency” twice since 2003—when the first OPAC opinion declared private university police departments *not* to be subject to APRA—and made no change to its scope to capture these types of departments. *See* P.L.1-2006; P.L.227-2007. Putting aside an amendment in 1989 that added the “security division of the state lottery commission” to the definition of “law enforcement agency,” the General Assembly added “gaming agents of the Indiana gaming commission” in 2006, and “gaming control officers of the Indiana gaming commission” in 2007. *Id.* That the General Assembly specifically broadened the definition of “law enforcement agency” without adding private university police departments—despite notice of OPAC’s interpretation—again underscores the original legislative intent not to have such university departments burdened by APRA.⁴ *See Andrews v. Mor/Ryde Intl.*, 10 N.E.3d 502, 506 (Ind. 2014) (“[T]he Legislature could readily have abolished [the] distinction between common law and statutory punitive damages as part of the major 1995 amendments. . . . [W]e find it instructive that an

³ For these amendments: *see* 1985 Ind. Acts 530; 1989 Ind. Acts 2376-2377; 1993 Ind. Acts 4875-4877; 1995 Ind. Acts 2321-2323; 2001 Ind. Acts 1530-1532; 2002 Ind. Legis. Serv. 687-688 (West); 2006 Ind. Legis. Serv. 52-53; 2007 Ind. Legis. Serv. 1553-1554; 2007 Ind. Legis. Serv. 2448.

⁴ Quite aside from OPAC’s duty to “make recommendations to the general assembly concerning ways to improve public access,” Ind. Code § 5-14-4-10(7), it bears noting that OPAC’s opinions are easily accessible to the public on the State of Indiana’s website: www.in.gov/pac.

amendment that dramatically increased the reach of the Punitive Damages Act nevertheless did not include a change extending it to encompass statutory treble damages.”).

Failing to apply this doctrine would cause considerable harm—not just to NDSP, but to many of the 31 private colleges and universities in Indiana that have relied on over a decade of interpretation from OPAC. In *Indiana Bell*, 715 N.E.2d at 355-56, for example, the Indiana Supreme Court determined whether a holding company related to the merger (share exchange) of two “Baby Bell” telecommunication companies was a “public utility” and thus subject to the Indiana Utility Regulatory Commission’s jurisdiction. *See id.* at 353. The transaction would have the effect of transferring control of Indiana Bell from Ameritech to SBC. *See id.* The proponents of Commission jurisdiction argued that the court should peer behind the merger and view it as a functional equivalent of a transfer of all the assets of a “public utility.” *See id.* at 354.

The Indiana Supreme Court held that the holding company involved in the transaction was not a “public utility.” While the word “control” in the statute defining a “public utility” might have been said—“on a clean slate”—to include holding companies or shareholders who owned and controlled a public utility, the court observed that a “very sizeable body of precedent points in the other direction however, and finding holding companies to be public utilities would effect a major change in relatively settled doctrine.” *Id.* at 355. Without a “clean slate,” the court identified the General Assembly as best suited to address this issue:

The difference between legislative and judicial or administrative resolution of the issue is enormous. If the law is changed by statute, it will be done prospectively with no effect on past transactions. On the other hand, it is difficult to see a principled decision finding Ameritech to be a public utility . . . that would not also call into question an array of past transactions by it and many other holding companies. . . . Section 83(a) itself would have been violated by several well-publicized acquisitions by other holding companies that have proceeded without Commission approval, some quite recently. . . .

If Ameritech and the many other holding companies owning Indiana utilities are themselves public utilities, a vast number of very public violations of these sections have been committed over the years in full view of the Commission, the courts and the General Assembly. The deafening silence that attended these events can only confirm the common understanding that holding companies are not themselves public utilities as defined by statute. Whether they should be subject to a higher degree of regulation is of course another matter, but it is for consideration by the General Assembly, not this

Court or the Commission. . . . [W]e conclude that the section means what it says, and no more.

Id. at 355; *accord Robbins*, 799 N.E.2d at 1062 (noting the General Assembly’s silence for over a decade after a prior ruling and the harm to a “decade’s worth of Indiana adoptions [that] have occurred where the parties’ expectations may well have been set based on [the prior] holding”).

In much the same way, this case should be left to the General Assembly’s province. Many of the 31 private universities and colleges making up the ICI, including Notre Dame, have relied for years on settled interpretation from OPAC on this issue and silence by the General Assembly; and they would be harmed by a 180-degree shift in how APRA has been interpreted for over a decade. NDSP has maintained its records with the understanding that they are not subject to APRA [Answer ¶8]. NDSP performs many functions for Notre Dame that are not traditional police powers, including assisting with the enforcement of Notre Dame’s student code (e.g. parietals), escorting students during late night hours⁵, providing “in care of” services for students who (without any crime or trauma involved) request transportation for private or sensitive issues (e.g., health or depression), planning for student and employee safety, coordinating efforts for internal disciplinary reviews, addressing non-criminal accidents, registering personal property and bicycles, acting at times as caretaker for students, and conducting safety educational programs [Answer ¶5]. Notre Dame would not jeopardize the personal and private details of students or its operations—deserving no measure of public scrutiny—had it known that NDSP’s records would be deemed “public records” [*Id.* ¶¶ 5,8]. In fact, were these records deemed “public records,” the Clery Act would require that certain records be created differently. *See, e.g.*, 20 U.S.C. § 1092(f)(8)(B)(v) (requiring university to protect victims’ confidentiality and personal identification information within “publicly-available recordkeeping”).

As an example specific to APRA, NDSP has never created the “daily log” that APRA requires of public agencies, much less done that within 24 hours after a suspected crime, accident, or complaint [Answer ¶14]. *See* Ind. Code § 5-14-3-5(c). Of course, many other private universities with police departments, such as Taylor University or Valparaiso University, who likewise have relied on opinions

⁵ This service is in addition to the University’s O’Snap (Student Night-Time Auxiliary Patrol) program, which provides free transportation service from students working for university security. *See* <http://ndsp.nd.edu/crime-prevention-and-safety/osnap/>.

from OPAC, likely will not have done so; and a judicial interpretation now would have the serious effect of finding that private universities have “violated” a law that, for years, they had understood not to apply to them. *See Indiana Bell*, 715 N.E.2d at 355; *see also Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002) (courts presume legislature intended an interpretation that avoids “unjust” results).

A judicial rather than legislative change could have the effect of suddenly treating more than 30 years of private records as public records, and for many of the 31 private colleges and universities in this State. If the long-standing interpretation of APRA has not been as the General Assembly has always intended the law to be read, the legislature is the proper body to make a change, where it can be done prospectively. *See Indiana Bell*, 715 N.E.2d at 355-56. Silence for over a decade underscores the General Assembly’s intent, and it is that intent that must be enforced. *See id.*; *Bolin*, 764 N.E.2d at 204; *Wright v. State*, 772 N.E.2d 449, 457 (Ind. Ct. App. 2002) (“legislature’s silence evidences its acquiescence in the existing judicial interpretation of [the] statute”). As Indiana courts have held many times, legislative acquiescence is controlling here. *See supra*. ESPN’s case should be dismissed.

C. In Addition to Legislative Acquiescence, NDSP Is an Arm of a Private University, Not a Public Agency under APRA.

1. By its plain language, APRA concerns the “affairs of government,” not the affairs of a private university or its campus police.

APRA expresses its public policy as providing access to public records “regarding the affairs of government and the official acts of those who represent them as public officials and employees.” Ind. Code § 5-14-3-1. The statute is concerned with “representative government,” “affairs of government,” and “official acts of . . . public officials and employees.” *Id.* APRA states:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

Ind. Code § 5-14-3-1. Notre Dame’s affairs are not the affairs of government, nor is its conduct the conduct of public officials. Whether campus security may wear a badge and affect an arrest does not make that department a public agency of any level of government, which the statute requires. *See Indiana Dept. of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind. 1994) (“nothing may be read into a

statute which is not within the manifest intention of the legislature” as ascertained from the “plain and obvious meaning” of its words). ESPN’s claim should be dismissed.

2. By law, NDSP is created, organized, equipped, paid, and controlled by a private university, not the government.

By statute, NDSP remains a department of a private university without control or interference from the government. *See* Ind. Code § 21-17-5-1 *et seq.* The statutory scheme under which the Trustees maintain NDSP applies only to private universities accredited by the North Central Association, and not to state educational institutions (which are subject to APRA). *See* Ind. Code § 21-17-5-1. By definition, the General Assembly has treated institutions such as Notre Dame as private for the purpose of maintaining a campus police department.

The Trustees—not the government—appoint NDSP police officers and prescribe their duties, doing so for the “educational institution for which *it* [the Board] is responsible.” Ind. Code § 21-17-5-2(1,2); *see also* Ind. Code § 21-17-5-1.⁶ By statute, the Trustees—not the government—“direct [NDSP’s] conduct.” Ind. Code § 21-17-5-2(2). The Trustees—not the government—prescribe “distinctive uniforms” for NDSP officers. Ind. Code § 21-17-5-2(3). NDSP officers are organized, paid, controlled, equipped, and directed by Notre Dame through its Office of Campus Safety under the University’s Executive Vice President—not by the government [Answer ¶5]. *See also* Ind. Code § 21-17-5-2.

Private university police may arrest persons who commit offenses, enforce and assist University officials in the enforcement of its rules and regulations, regulate traffic (though not to the exclusion of any governmental authority), and “assist and cooperate with other law enforcement agencies and law enforcement officers.” Ind. Code §§ 21-17-5-4, 21-17-5-7. While campus police officers enjoy “general police powers” and certain “statutory powers, privileges, and immunities as sheriffs and constables,” the Trustees may restrict their ability to serve civil process and may “expressly forbid [the] officers from exercising any powers otherwise granted to the police officer by law.” Ind. Code § 21-17-5-4(b). This discretion is given to the Trustees, a private body.

⁶ The Trustees have done so through their Resolution dated October 28, 1977 (under the predecessor § 20-12-3.5-1 *et seq.*). [Answer ¶4].

NDSP officers may exercise their powers on university property and adjacent streets; and by notice to the St. Joseph County Sheriff and Indiana State Police Superintendent, they may also do so within St. Joseph County or temporarily in other areas—*provided* that has been approved by the University’s Executive Vice President and that NDSP officers operate in cooperation with local, county, and state law enforcement [Answer ¶5]. *See* Ind. Code § 21-17-5-5.

By statute, campus law enforcement serves at Notre Dame’s pleasure and in accordance with an oath that the Trustees prescribe—not the government. “Police officers appointed under this [Chapter 5] shall take an appropriate oath of office in the form and manner prescribed by the appointing governing board. *The police officers serve at the pleasure of the appointing board.*” Ind. Code § 21-17-5-3 (emphasis added). Thus, Indiana statute crystalizes the idea that campus police serve Notre Dame, not the state or its branches of government that undergird APRA’s policy of public access. ESPN’s position that NDSP is a public law enforcement agency contradicts the plain construction of these statutes and the indisputable fact that NDSP is organized, equipped, and controlled by a private body—not the government. *See Bolin*, 764 N.E.2d at 204 (courts must give statutes their plain meaning). ESPN’s claim should be dismissed.

3. By APRA’s plain language, NDSP is not a “public law enforcement agency.”

ESPN contends that NDSP is a public law enforcement agency [Compl. ¶5]. APRA’s definition of a public “law enforcement agency” does not encompass NDSP. APRA covers a “law enforcement agency . . . of any level of government.” Ind. Code § 5-14-3-2(n)(6). That provision goes on in rather specific fashion to include prosecuting attorneys, excise police, conservation officers, gaming agents or control officers, and the lottery commission’s security division. *Id.* Adopting ESPN’s position would effectively read out of the definition plain terms that the General Assembly included:

A law enforcement agency “means an agency or a department ~~of any level of government~~ that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff’s department ~~of a political subdivision~~, prosecuting attorneys, members of the excise police division of the [ATC], conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission.

Ind. Code § 5-14-3-2(n)(6). That is not the proper function of statutory construction.

The General Assembly was careful to specify the law enforcement agencies that would be subject to APRA—those of government and those of political subdivisions. Over time, the legislature included additional “governmental” police agencies to this definition. *See supra*. Private campus police departments were never included. If it were as simple as, “if you wear a badge, you are a public agency” (the new PAC’s statement to ESPN), then the General Assembly could have defined “law enforcement agency” as “*any* law enforcement agency.” Simply that; but it did not. The General Assembly could have defined “public agency” to include a law enforcement department, whether or not a department of the government or a political subdivision, but again it did not.⁷ APRA’s plain language applies to law enforcement agencies of “government” and “political subdivisions.” This Court should not go beyond what the General Assembly expressed in its plain statutory language, or an interpretation reinforced by years of legislative acquiescence.

The same result has been reached for private universities in other states. For instance, in *Ochsner v. Elon Univ.*, 725 S.E.2d 914, 918-20 (N.C. Ct. App. 2012), the court concluded that Elon University’s campus police department was not a “public law enforcement agency” subject to that state’s Public Records Act. As an arm of a private university, the police department was not among the types of law enforcement departments identified in the Public Records Act. “[I]f the legislature had intended for campus police departments to be subject to the Public Records Act, it could have listed campus police departments as public law enforcement agencies.” *Id.* at 920.

Likewise, in *The Harvard Crimson, Inc. v. President of Harvard College*, 840 N.E.2d 518, 523 (Mass. Sup. Ct. 2006), the court held that Harvard University and its Harvard University Police Department were not subject to that state’s public records law: “The public records law, and its implementing

⁷ Under the new PAC’s view of the law, APRA would presume to encompass private companies that have been granted police powers for felonies, railroad companies that hire police officers, bank security officers, retail stores that detain shoplifters, perhaps even individuals who affect a citizen’s arrest or who have been authorized by state statute to use reasonable force to make that arrest, taking APRA well beyond its intended scope. *See* Ind. Code §§ 8-3-17-1, 35-33-6-2, 35-33-1-4, and 35-41-3-3. Just because someone wears a badge or investigates a crime does not mean he is a governmental actor. *See, e.g., United States v. Garlock*, 19 F.3d 441, 443-44 (8th Cir. 1994) (“courts have consistently held that the mere fact that an individual’s job involves the investigation of crime does not transform him into a government actor”).

regulations, are applicable to documents held by public entities, not private ones. Simply put, Harvard University is a private institution, a fact not challenged by the Crimson. It follows, therefore, that records in the custody of the HUPD, a department within Harvard University, are not ‘public records’ that fall within the ambit of [Massachusetts’ Public Records Law].”

In *The Corp. of Mercer Univ. v. Barrett & Farahany, LLP*, 610 S.E.2d 138, 141 (Ga. Ct. App. 2005) (later amended by statute), the court also held that a police department created by Mercer University, a private institution, was not a “public agency” subject to Georgia’s Open Records Act. That statute, like Indiana’s APRA, defined public agency to include governmental agencies or political subdivisions of the state. In reaching its conclusion, the court noted: “There is no dispute that MUPD officers are employees of Mercer University, are compensated solely by Mercer University, and function under the direction and control of Mercer University. . . . The mere fact that MUPD officers are given authority to perform certain functions by the Campus Policemen Act, and the Georgia Police Officer Standards and Training Act, does not make them officers or employees of a public office or agency. The statutory language simply does not provide this Court with the authority to find private entities delegated certain authority by the state to be public offices or agencies.” *Id.* 140-41.

The latest opinion from the new PAC failed to address the statutory language the General Assembly adopted in defining “law enforcement agency.” Indeed, it did not even quote or discuss the words used by the General Assembly in defining “public agency.” *See* Advis. Op. 14-FC-239. Instead, it cited the “spirit” of the law. *See id.* at 4. For that reason alone, its attempt at statutory construction is not deserving of weight. Its revision of well-settled interpretation of APRA relied on cases under 42 U.S.C. § 1983. Whether NDSP officers act “under color of state law” for constitutional purposes under the federal statute, *see, e.g., Finger v. State*, 799 N.E.2d 528, 532 (Ind. 2003) (finding Butler University police officer as subject to constitutional constraints), does not answer the question whether NDSP is a “public agency” as it is specifically defined by Indiana statute and as it has been left standing for years by the General Assembly, particularly when the new PAC was not writing on a clean slate. *See Indiana Bell*, 715 N.E.2d at 355-56. ESPN’s case should be dismissed.

4. NDSP is not a public agency under any other definition within APRA.

This case should turn on the definition of “law enforcement agency” alone. Turning to other definitions within APRA would not only exceed the scope of the pleadings, *see* Ind. Trial R. 12(C), but also violate fundamental tenets of statutory construction. The General Assembly has provided a clear and express definition of “law enforcement agency,” which does not include NDSP. *See St. Vincent Hosp. and Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-04 (Ind. 2002) (the “first step in interpreting any Indiana statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question” and enforce that intent).

It has long been a “basic tenet of statutory interpretation that [courts] will strive to avoid an interpretation that renders any part of the statute meaningless or superfluous.” *Hatcher v. State*, 762 N.E.2d 189, 192 (Ind. Ct. App. 2002). Indiana courts “interpret a statute such that every word receives effect and meaning.” *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000); *see also In re ITT Derivative Litig.*, 932 N.E.2d 664, 670 (Ind. 2010) (“We interpret a statute in order to give effect to every word and render no part meaningless if it can be reconciled with the rest of the statute.”); *City of N. Vernon v. Jennings Nw. Reg'l Utilities*, 829 N.E.2d 1, 4-5 (Ind. 2005) (courts must avoid interpretations that render part of a statute meaningless, bring about an absurd result, or create an illogical application).

APRA contains definitions of “public agency” beyond law enforcement agency, but none should be interpreted to apply here. For instance, in subsection (n)(1), a “public agency” under APRA means any “board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.” Ind. Code § 5-14-3-2(n)(1). If the General Assembly meant to encompass all law enforcement agencies, including those of private universities, within this definition of “public agency” because they exercise police powers, there would be no reason to have included a separate and express definition of “law enforcement agency” in § 5-14-3-2(n)(6). Police departments would have already been covered. Reading subsection (n)(1) that broadly would swallow the definition of law enforcement agency in subsection (n)(6), and essentially write it out of the statute. But the General Assembly included it, and subsection (n)(6)’s definition of law enforcement

agency should be given its proper effect—not rendered meaningless or superfluous.⁸ *Cf. Preferred Prof. Ins. Co. v. Crystal West*, 2014 Ind. App. LEXIS 615, 33-34 (Ind. Ct. App. Dec. 16, 2014) (finding that, if one definition of “patient” in a statute were read expansively, it would effectively render the rest of the statute’s language defining “patient” meaningless and without purpose); *see also State v. CSX Transp.*, 673 N.E.2d 517, 519 (Ind. Ct. App. 1996) (“When interpreting the words of a single section of a statute, this court must construe them with due regard for all other sections.”).

Concluding that private university police departments fall under some other definition of “public agency,” such as § 5-14-3-2(n)(1), would not only render § 5-14-3-2(n)(6) meaningless, but also violate other basic tenets of statutory construction. Since a specific definition of “public agency” governs over any general provision, there is no need to go beyond § 5-14-3-2(n)(6)’s definition of “law enforcement agency.” *See White v. Indiana Parole Bd.*, 713 N.E.2d 327, 329 (Ind. Ct. App. 1999) (“specific statutory provisions take priority over general statutory provisions”). The definition of “law enforcement agency” is dispositive here.

In addition, as a matter of plain statutory construction, NDSP does not exercise the executive or other power of the State of Indiana or local government. NDSP exercises the executive power of the University’s Board of Trustees—and does so by law. Notre Dame appoints its police officers and prescribes their duties, without any interference or control by any state or local government. *See Ind. Code* § 21-17-5-2(1,2); *see also Ind. Code* § 21-17-5-1. NDSP answers to and serves at the pleasure of the Trustees. *See Ind. Code* § 21-17-5-3. ESPN’s interpretation of APRA would place that law in conflict with Indiana Code § 21-17-5-1 *et seq.* when the statutes should be harmonized. *See Patrick*, 848 N.E.2d at 1086 (statutes in apparent conflict should be construed in a manner to bring them into harmony). Based on fundamental principles of statutory construction, judgment should be entered for Notre Dame, and this case should be dismissed.

⁸ OPAC previously agreed, finding that interpreting APRA to include campus police departments under some other definition would read out of the statute important provisions that the General Assembly included, particularly § 5-14-3-2(m)(6), now codified as § 5-14-3-2(n)(6). *See Advis. Op. 10-FC-304*. The latest opinion from the new PAC failed to address this issue. This is yet another reason why the new opinion is not deserving of weight.

5. **Indiana cases addressing the definition of “public agency” under APRA favor Notre Dame.**

Indiana cases under APRA have rejected the idea that private entities are “public agencies” even when there has been a significant degree of control from the state. *See, e.g., Perry County*, 712 N.E.2d at 1022-24; *Indiana Univ. Foundation*, 647 N.E.2d at 348-51. There are no allegations of control in ESPN’s complaint, and for good reason. By law, NDSP answers to a private body (the Trustees)—not the state. *See* Ind. Code §§ 21-17-5-2, 21-17-5-3. NDSP’s case is thus even stronger than these past Indiana cases.

In *Indiana Univ. Foundation*, 647 N.E.2d at 347-51, for instance, the court considered whether the Foundation’s account records were subject to APRA. In doing so, the court analyzed whether the Foundation was a “public office” and whether gifts from private donors were “public funds” based on control from Indiana University (a state entity) and its Trustees (also a state agency). *See id.* at 349. The court held that, when the Foundation, a private, not-for-profit corporation, accepted or held private donations pursuant to powers delegated to it by the Trustees, the funds were “private” not “public.” *Id.* The “legislature’s broad statutory grant of discretion to the Trustees” and the Trustees’ delegation of authority to the Foundation did not render the Foundation a “public office,” or cause it to perform a “public function” or to receive “public funds.” *Id.* at 350-55; *see also Perry County*, 712 N.E.2d at 1022-26 (holding that a private not-for-profit development corporation was not a “public agency” under APRA even though under majority control of governmental agencies, working with Perry County to promote economic development, and receiving almost entirely public funds because “[w]orking closely with the County is not tantamount to being compelled to do the County’s bidding or working subject to its control”).

Notre Dame’s position is much stronger. As a state university, Indiana University and its Trustees are a state agency; as a private university, Notre Dame’s Trustees are not.⁹ Notre Dame’s Trustees act in a purely private capacity, based on their discretion, in determining whether to maintain a campus police force, what powers to permit, and how the department will function. By law, there is not even the appearance of overlapping control from the state as there was in the case of the Indiana

⁹ *See Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dept.*, 510 F.3d 681, 694-97 (7th Cir. 2007) (“So it seems to follow that the Board of Trustees of Indiana University, like the university, is a state agency.”).

University Foundation or Perry County Development Corporation. Here, neither the Trustees nor NDSP are compelled by statute to be controlled by any government (state or local). The Trustees exercise discretion afforded by statute, doing so as a private body for a private university. If the Indiana University Foundation, controlled by a state agency, could not be said to be a public agency, NDSP, controlled by a private body, cannot be held a public agency. ESPN's claim should be dismissed.

6. Private university police departments such as NDSP are not considered “public agencies” under many other laws, so this treatment of APRA is consistent.

Reaching the conclusion that NDSP is a “public agency” subject to the APRA would run afoul of how many other laws treat Notre Dame's police department. NDSP is not considered a “public agency” for many other purposes. Notre Dame's position is consequently consistent with how these other laws treat NDSP as something other than a “public agency.”

For instance, under the Fair Labor Standards Act (FLSA), university police departments are not considered a “public agency” engaged in “law enforcement activities” for the purpose of determining whether its officers must work more than 40 hours to qualify for overtime pay and to schedule like governmental or public police partners. *See, e.g., Adams v. Pittsburg State Univ.*, 832 F. Supp. 318, 320-22 (D. Kan. 1993). Unlike actual “public agencies” engaged in “law enforcement activities” who receive overtime after logging 43 hours (such as the Indiana State Police), NDSP is not considered under FLSA to be a “public agency” and thus its officers receive overtime after logging 40 hours a week. *Id.*

State police or other public safety officers receive certain federal benefits, but Notre Dame's campus police officers do not [Answer ¶ 5]. For instance, public safety officers are eligible for federal death benefits under 42 U.S.C. § 3796. The police officers of private universities are not eligible, given that they are not working for a “public agency” under federal law—essentially the same concept that we must consider under APRA. *See* 42 U.S.C. § 3796b(9)(A) (emphasis added). That federal law does not include a private campus police officer since he or she does not work for an arm of the government or state agency. *See* 42 U.S.C. § 3796b(8).¹⁰

¹⁰ Under the Public Safety Officers' Death Benefits Act, a public agency means “the United States, any State of the United States . . . or any unit of local government, department, agency, or instrumentality of any of the foregoing.” 42 U.S.C. § 3796b(8).

Federal assistance with body armor under the U.S. Department of Justice's BJA program is also not available to NDSP as it is for traditional state or governmental police [Answer ¶5]. Indeed, much like APRA, that program defines law enforcement officers to include traditional police officers, conservation officers, excise officers, and even state university police departments, but not "private college and university police officers." See <https://www.bja.gov/FAQDetail.aspx?ID=122>.

The Law Enforcement Officers' Safety Act permits certain police officers to carry concealed firearms anywhere, but not NDSP. See <http://www.fop.net/legislative/issues/hr218/hr218faq.pdf>. Notre Dame's police officers must pay income tax on personal and commuting miles of take-home vehicles given to them by Notre Dame under Ind. Code § 21-17-5-2(4) (permitting the University to designate emergency vehicles), when governmental or public police officers do not [Answer ¶5].

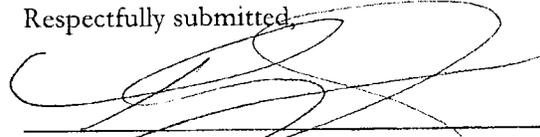
Accordingly, there are fundamental differences between governmental law enforcement and private campus police departments. Broadening APRA beyond its plain terms and beyond three OPAC advisory opinions to include anyone who wears a badge would risk treating many private institutions, not just private universities like Notre Dame or its campus police departments, as "public agencies." And, in many cases, it would do so without the benefits of being considered a "public agency." This is all the more reason why this subject is more suited to legislative policy-making, not judicial expansion of a 30-year old settled text.

CONCLUSION

For these reasons, Notre Dame requests judgment on the pleadings in its favor and against ESPN, with all fees, costs, and other just and proper relief afforded by law. This motion is without waiver of any rights, including any exemptions, privileges, or other restrictions provided by law.

Dated: February 12, 2015

Respectfully submitted,



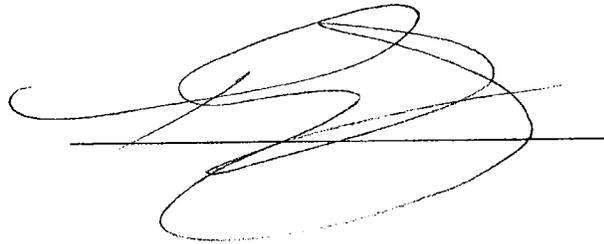
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of February 2015, a true and correct copy of the foregoing was served via email and/or United States mail, first-class postage prepaid, to the following counsel of record:

James Dimos, Esq.
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201 North Illinois Street, Suite 1900
Indianapolis, IN 46244-0961



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEZMINE WELLS,	:	
	:	
Plaintiff,	:	NO: 1:13-CV-00575
	:	
v.	:	
	:	OPINION AND ORDER
XAVIER UNIVERSITY, et al.,	:	
	:	
Defendants.	:	

This matter is before the Court on Defendants' Partial Motion to Dismiss (doc. 12), Plaintiff's Response in Opposition (doc. 15), and Defendants' Reply (doc. 18). For the reasons indicated herein, the Court GRANTS IN PART and DENIES IN PART Defendants' motion.

I. Background

Plaintiff Dezmine Wells is a former student athlete at Defendant Xavier University ("Xavier"); he was a member of the Xavier men's basketball team during the 2011-2012 season (doc. 7). In July 2012 Plaintiff alleges he was falsely accused of sexual assault by his resident advisor, a female upper-classman (Id.).

Plaintiff alleges the allegations against him came within the context of Xavier's recent mishandling of sexual assault allegations that triggered an investigation in January 2012 by the United States Department of Education's Office of Civil Rights ("OCR") (Id.). OCR's investigation focused on the allegation that Xavier allowed a male student accused of sexual assault of two

women to remain on campus (Id.). In February, OCR opened yet another investigation with regard to a third alleged sexual assault case (Id.). Ultimately Xavier and OCR entered into an agreement so as to establish training and reporting programs to address sexual assault and harassment on campus (Id.).

Plaintiff essentially alleges that Defendants Xavier and its President Defendant Father Graham, ("Graham") made him into a scapegoat so as to demonstrate a better response to sexual assault (Id.). He alleges, however, that his conduct with his resident advisor was entirely consensual (Id.).

Plaintiff alleges that he and other students gathered in the early morning hours of July 7, 2012, and played the game "truth or dare," which involved many dares that were sexual in nature (Id.). Plaintiff alleges that during the game his resident advisor exposed her breasts, removed her pants, gave him a "lap dance," and kissed him several times (Id.). He further alleges that later in the evening, the resident advisor invited him to her room, where she asked him whether he had a condom, and where they both willingly engaged in a sexual encounter (Id.). Plaintiff alleges multiple witnesses who saw the resident advisor shortly thereafter indicated her demeanor was completely normal (Id.).

Plaintiff alleges that later that day the resident advisor claimed to campus police that Plaintiff had raped her (Id.). An examination at University Hospital showed no trauma as

a result of the sexual encounter (Id.). The alleged victim allegedly told Cincinnati Police she did not want to press charges against Plaintiff (Id.). The Hamilton County Prosecuting Attorney later investigated, allegedly doubted the rape accusations against Plaintiff, and attempted to communicate his doubts to Defendant Graham, who did not answer messages (Id.).

Despite the Prosecuting Attorney's request to Defendant Graham to hold off on any campus proceedings pending the outcome of his official investigation, the Xavier University Conduct Board ("UCB") held a hearing on August 2, 2012¹ (Id.). Plaintiff alleges the UCB failed to follow university policies for disciplinary proceedings, conducted an unfair hearing, and defamed Plaintiff (Id.). Xavier announced Plaintiff was found responsible by the UCB for a "serious violation" of the Code of Student Conduct and that he would be expelled (Id.).

Plaintiff seeks to have the UCB decision vacated, as well as actual and punitive damages (Id.). In his Amended Complaint, Plaintiff brings eleven claims for relief: 1) breach of contract (the college Handbook); 2) intentional infliction of emotional distress; 3) libel per se, injury to personal reputation; 4) libel per se, injury to athletic and professional reputation; 5) libel,

¹Defendants indicate in their Reply (doc. 18) that Plaintiff incorrectly suggests the Prosecutor's request came before the UCB hearing, when in fact, it came later. In the context of this motion to dismiss, the Court takes Plaintiff's allegations as true.

reckless disregard/malice; 6) libel per quod; 7) vacatur of the arbitration decision based on arbitrator's partiality; 8) vacatur of the arbitration decision based on the arbitrator's misconduct; 9) violation of Title IX/discrimination on basis of sex; 10) violation of Title IX/deliberate indifference; and 11) Negligence (Id.).

In the instant Motion to Dismiss brought by Xavier and Graham, Defendants contend Plaintiff's third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth claims for relief should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) (doc. 12). Defendants also deny the remaining claims, but express the intent to attack those claims when procedurally appropriate (Id.). Plaintiff has responded, conceding his seventh and eighth claims, but defending the balance of his Amended Complaint (doc. 15). Defendants have replied (doc. 18), such that this matter is ripe for the Court's consideration.

II. Motion to Dismiss Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed. R. Civ. P. 8(a), which requires that a pleading "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976); Erickson v.

Pardus, 551 U.S. 89 (20057). In its scrutiny of the complaint, the Court must construe all well-pleaded facts liberally in favor of the party opposing the motion. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Courie v. Alcoa Wheel & Forged Products, 577 F.3d 625, 629-30 (6th Cir. 2009), quoting Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

A motion to dismiss is therefore a vehicle to screen out those cases that are impossible as well as those that are implausible. Courie, 577 F.3d at 629-30, citing Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L. REV. 873, 887-90 (2009). A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Iqbal, 129 S.Ct. at 1949. Plausibility falls somewhere between probability and possibility. Id., citing Twombly, 550 U.S. at 557. As the Supreme Court explained,

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Id. at 1950.

The admonishment to construe the plaintiff's claim liberally when evaluating a motion to dismiss does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice and Procedure: § 1357 at 596 (1969). "In practice, a complaint...must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory." Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), quoting In Re: Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981); Wright, Miller & Cooper, Federal Practice and Procedure, § 1216 at 121-23 (1969). The United States Court of Appeals for the Sixth Circuit clarified the threshold set for a Rule 12(b)(6) dismissal:

[W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988).

III. Discussion

A. Libel Claims

Defendants first attack Plaintiff's claims premised on libel, counts three through six (doc. 15). Under Ohio law to

establish a libel claim, a Plaintiff must show 1) a false statement, 2) defamatory to Plaintiff, 3) published to a third party, 4) by a Defendant who was at least negligent, and 5) damage to Plaintiff's reputation. Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 312 (6th Cir. 2000). Defendants contend the statement they issued was true, such that Plaintiff cannot show the first element of libel, falsity. Defendants' statement follows:

The Xavier University Conduct Board (UCB), made up of faculty, students and administrators, found Xavier sophomore and basketball player Dezmine Wells responsible for a serious violation of the Code of Student Conduct. The punishment for the violation is expulsion from the University. While we understand there is heightened interest in this situation because it involves a student-athlete, we must reiterate that first and foremost Xavier's interest and responsibility to all of our students is to provide a quality education in a safe and nurturing environment. A serious violation of Xavier's Code of Student Conduct will not be tolerated. All Xavier students are subjected to the same protections and consequences. Because of Federal privacy law restrictions, no additional comments may be made in order to protect the privacy of those involved, and to honor the integrity of the UCB process.

In Plaintiff's view the above statement constitutes libel because he did not commit a violation, serious or otherwise, such that the statement is inherently false (doc. 15). Moreover, in Plaintiff's view everyone knew the statement referred to alleged sexual assault so that at the very minimum it qualified as libel per quod, that is, libel by implication (Id.).

When faced with a motion to dismiss, the Court is required to take Plaintiff's plausible allegations as true. Here, Plaintiff alleges the university's statement has marked him as a

person kicked out of school for a serious violation, that everyone understood meant sexual assault. The Court finds the allegation plausible that Defendant's statement in context amounts to an untruth, should the balance of Plaintiff's allegations be taken as true: that the conduct board was ill-equipped to conduct a hearing on such a serious matter, that outside government authorities questioned the outcome, and that press coverage demonstrates damage to his reputation.

The Court finds this a close call. Indeed, normally judicial and quasi-judicial proceedings are entitled to an absolute privilege, so as to encourage witnesses to speak the truth. 50 Am. Jur. 2d *Libel and Slander* § 280. However, here, Plaintiff essentially alleges the proceedings themselves were invalid, that he was denied the right to a lawyer, denied the opportunity to cross-examine his accuser, and denied character witnesses although his accuser was not. Moreover, it appears to the Court that the UCB here, a body well-equipped to adjudicate questions of cheating, may have been in over its head with relation to an alleged false accusation of sexual assault. Such conclusion is strongly bolstered by the fact that the County Prosecutor allegedly investigated, found nothing, and encouraged Defendant Father Graham to drop the matter. Plaintiff's allegations suggest Graham did not do so due to Xavier's mishandling of other cases that were at nearly the same time, subject to investigation by the OCR. In addition, Plaintiff's allegations raise questions regarding the

UCB's lack of training or experience with interpretation of the results from the hospital. Taken together, the Court finds Plaintiff's alleged facts supporting his libel claims sufficient to survive Defendants' motion to dismiss, because Xavier's statement indicated Plaintiff was guilty of a serious offense meriting expulsion. Defendants are on adequate notice of the theories of libel raised against them.

B. Vacatur Claims

Plaintiff concedes in his Response (doc. 15, fn. 4) that his claims for vacatur are barred by the statute of limitations. As such, the Court finds Defendants' motion to dismiss correct in relation to such claims.

C. Title IX Claims

Title IX is a federal statute designed to prevent sexual discrimination and harassment in educational institutions receiving federal funding. 20 U.S.C. § 1681. It provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . ." 20 U.S.C. 1681(a).

Defendant attacks Plaintiff's ninth and tenth claims for relief, each of which is premised on Title IX. In Plaintiff's ninth claim, he alleges Xavier violated Title IX by reaching an erroneous outcome on the basis of sex; while his tenth claim alleges deliberate indifference on the part of Father Graham (doc.

7). Defendants contend Plaintiff's allegations against Father Graham fail because Title IX does not impose individual liability (doc. 12, citing Petrone v. Cleveland State University, 993 F.Supp. 1119, 1125 (N.D. Ohio 1998), Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 730 (6th Cir. 1996) (Nelson, J., concurring)). Plaintiff does not contest such proposition, but responds that the Amended Complaint adequately pleads Title IX claims against Xavier under both erroneous outcome and deliberate indifference theories (doc. 15).

To prevail on an erroneous outcome theory Plaintiff would ultimately need to prove the hearing was flawed due to his gender. Yusuf v. Vassar College, 35 F.3d 709, 715 (2d Cir. 1994). Defendants contend Plaintiff's Complaint fails to adequately allege his gender affected the outcome of the hearing (doc. 12). Plaintiff responds that taken together, his allegations show Defendants were reacting against him, as a male, to demonstrate to the OCR that Defendants would take action, as they had failed to in the past, against males accused of sexual assault (doc. 15).

The Court finds that taking all inferences in favor of Plaintiff, as it is required to do in its consideration of a motion to dismiss, Plaintiff's erroneous outcome theory survives Defendants' challenge. Plaintiff's Complaint puts Defendants on adequate notice that he contends they have had a pattern of decision-making that has ultimately resulted in an alleged false outcome that he was guilty of rape. Whether Plaintiff can unearth

adequate evidence to support such claim against further challenge remains to be seen. His Complaint, however, recounts Defendants having rushed to judgment, having failed to train UCB members, having ignored the Prosecutor, having denied Plaintiff counsel, and having denied Plaintiff witnesses. These actions came against Plaintiff, he contends, because he was a male accused of sexual assault.

Similarly, Defendants attack Plaintiff's Title IX theory based on deliberate indifference. Under this standard Plaintiff must ultimately show that an official of the institution who had the authority to institute corrective measures had actual notice of and failed to correct the misconduct, in this case the alleged defective hearing. Mallory v. Ohio University, 76 Fed. Appx. 634, 640 (6th Cir. 2003).² Plaintiff has established that he was found responsible for sexual assault, which is objectively offensive, and which resulted in his expulsion, a deprivation of access to educational opportunity at Xavier. There is no question that

² A classic case of Title IX deliberate indifference relates to sexual harassment. To establish such a claim according to Defendants, Plaintiff must show: 1) the sexual harassment was so severe, pervasive or objectively offensive that it could be said to deprive plaintiff of access to the educational opportunities or benefits provided by the school, 2) the funding recipient had actual notice of the sexual harassment, and 3) the funding recipient was deliberately indifferent to the harassment. Vance v. Spencer County Public Sch. Dist., 231 F.3d at 253, 258-59 (6th Cir. 2000). Defendants contend Plaintiff fails to raise adequate allegations as to any prong of a deliberate indifference claim. A liberal reading of Plaintiff's Complaint shows he was subjected to unfounded allegations and an unfair process due in part the OCR and his status as a male student accused of assault.

Defendants were on notice of Plaintiff's situation.

Defendants rely on Doe v. University of the South, 687 F.Supp.2d 744, 757-58 (E.D. Tenn. 2009), in which the Court rejected such a claim as applied to a challenge of disciplinary proceedings (doc. 18). Although the case in Doe has parallels to the case at bar, the Court finds additional allegations here absent in the Doe matter. Here, a liberal reading of the Complaint shows Plaintiff alleges Defendant Graham knew of the allegations against Plaintiff, and that Defendant Graham ignored warnings from the Prosecutor that such allegations were unfounded. It further alleges Defendant Graham allowed the defective hearing against Plaintiff with the goal of demonstrating to the OCR that Xavier was taking assault allegations seriously. In the Court's view, these allegations are sufficient to put Defendants on adequate notice to the claim that Defendant Graham was deliberately indifferent to Plaintiff's rights.

IV. CONCLUSION

Having reviewed this matter, the Court finds Defendants' Motion well-taken as to Plaintiff's Vacatur claims based on the theory that such claims are barred by the statute of limitations, and agrees that Title IX imposes no individual liability on Defendant Graham. The Court rejects the balance of the motion.

Accordingly, the Court GRANTS IN PART AND DENIES IN PART Defendants' Partial Motion to Dismiss (doc. 12), such that it DISMISSES Plaintiff's Seventh and Eighth claims for relief, FINDS

Defendant Graham not liable in his individual capacity for any Title IX claims as a matter of law, and it DENIES such motion as to Plaintiff's libel and Title IX claims. This case shall proceed against Defendants on Plaintiff's claims for 1) breach of contract (the college Handbook); 2) intentional infliction of emotional distress; 3) libel per se, injury to personal reputation; 4) libel per se, injury to athletic and professional reputation; 5) libel, reckless disregard/malice; 6) libel per quod; 7) Negligence; and against Defendant Xavier only on Plaintiff's claims for 8) violation of Title IX/discrimination on basis of sex; and 9) violation of Title IX/deliberate indifference.

SO ORDERED.

Dated: March 11, 2014

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge



2 of 4 DOCUMENTS



Positive

As of: Jun 16, 2015

**BENJAMIN C. MALLORY, Plaintiff-Appellant, v. OHIO UNIVERSITY, RYAN
DAVIS, BRADLEY PITCHER, and HARRIS PRATSINAKIS,
Defendants-Appellees.**

No. 01-4111

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

76 Fed. Appx. 634; 2003 U.S. App. LEXIS 19025

September 11, 2003, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Mallory v. Ohio Univ.*, 157 L. Ed. 2d 703, 124 S. Ct. 811, 2003 U.S. LEXIS 8666 (U.S., Dec. 1, 2003)

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. 98-01165. *Holschuh*. 09-13-01.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff student appealed the judgment of the United States District Court for the Southern District of Ohio granting defendant university summary judgment in the student's sexual discrimination action filed under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. §§ 1681-1688.

OVERVIEW: The student was subjected to disciplinary proceedings and was expelled for sexually assaulting a female student. Both students were intoxicated, and witnesses reported that the female student was unconscious. The district court granted the university summary judgment, holding that the student had failed to show that the university's actions were motivated by the student's sex. On appeal, the court affirmed. The student failed to show that the outcome of the university's disciplinary proceeding was erroneous because of sex bias, as the university's decision to focus on the female student's ability to consent merely demonstrated its policy to punish those who engaged in sexual conduct with

another person when the first person was aware of the other's inability to consent, and there was no evidence that this policy was discriminatorily applied or motivated by a chauvinistic view of the sexes. A complaint filed by a male student against a female student six years earlier was significantly different than the case at hand and did not prove that the director of judiciaries for the university held the biased view that men could not be violated.

OUTCOME: The judgment granting the university summary judgment in the student's sexual discrimination action was affirmed.

COUNSEL: For BENJAMIN C. MALLORY, Plaintiff - Appellant: Jan L. Roller, Dennis R. Fogarty, Davis & Young, Cleveland, OH.

For OHIO UNIVERSITY, Defendant - Appellee: Keith W. Schneider, Maguire & Schneider, Columbus, OH.

For HARRIS PRATSINAKIS, Defendant - Appellee: Herman A. Carson, Sowash, Carson & Shostak, Athens, OH.

For BRADLEY PITCHER, Defendant - Appellee: William B. Benson, Michael L. Close, Wiles, Boyle, Burkholder & Brindardner, Columbus, OH.

For RYAN DAVIS, Defendant - Appellee: Christopher R. Meyer, Rodney A. Nelson, Reese, Pyle, Drake & Meyer, Newark, OH.

JUDGES: Before: NORRIS, DAUGHTREY, and ROGERS, Circuit Judges.

OPINION BY: Rogers

OPINION

[*636] **ROGERS, Circuit Judge.** Benjamin C. Mallory filed a complaint against Ohio [*2] University (the "University") for sexual discrimination under Title IX. 20 U.S.C. §§ 1681-1688, alleging that the University discriminated against him by initiating a disciplinary proceeding against him and by concluding that he committed sexual assault under the University's code of student conduct. Mallory also filed state-law defamation claims against three students--Ryan Davis, Bradley Pitcher, and Harris Pratsinakis--each of whom made statements in connection with Mallory's disciplinary

proceeding. The district court granted the University summary judgment against Mallory, finding that Mallory failed to present a genuine issue of material fact with regard to whether the University's actions were motivated by Mallory's sex. The district court also declined to exercise jurisdiction over Mallory's supplemental state-law claims, having disposed of Mallory's only federal claim. Mallory appeals, arguing that the district court erred in granting the University summary judgment and asking the court to order the assertion of supplemental jurisdiction over Mallory's state-law defamation claims upon remand. We conclude that the district court (1) correctly determined [**3] that Mallory failed to present a genuine issue of material fact regarding discriminatory motive and (2) did not abuse its discretion in declining to exercise jurisdiction over Mallory's state-law claims. Accordingly, we affirm the judgment of the district court.

On November 19, 1997, Benjamin Mallory was to meet Audrey DeLong and some of her friends at a bar in downtown Athens, Ohio. Prior to meeting DeLong that night, Mallory drank three beers in his dorm room. When Mallory met DeLong at the bar, it was clear to him that DeLong had been drinking throughout the evening. Both DeLong and Mallory continued to drink at bars in Athens that night, each consuming a number of drinks. At the end of the evening, Mallory and DeLong were together in Mallory's dorm room.

The two had been necking for a time in Mallory's room when DeLong became sick and vomited on Mallory and his bed. Mallory then took DeLong to the bathroom and put her into a toilet stall as she continued vomiting. While DeLong was in the stall, several students who lived on the hall observed DeLong in what they described as an obviously intoxicated state, and some witnesses recalled that DeLong had passed out while she was in [**4] the stall. Later, Mallory and a fellow student took DeLong into a shower stall to clean off the vomit. After DeLong was in the shower, the other student left, and Mallory began washing vomit off himself in an adjacent shower stall. According to Mallory, DeLong then entered his stall and began [*637] making sexual advances. Mallory claims that he first resisted DeLong's advances, but then consented. The two then began having sex in the shower stall. A number of students witnessed Mallory and DeLong in the shower: some of the students indicated that DeLong was not moving during the incident. One student claimed that DeLong was not only

still, but she was silent and her eyes were closed. Two Resident Assistants ("RAs") eventually intervened and DeLong was taken back to her sorority house. Then, after speaking with several witnesses, the two RAs prepared a Community Incident Report, which noted that "Ben Mallory recalled the incident and most likely Audrey DeLong did not."

After the University Police completed an investigation, the University instituted a disciplinary proceeding against Mallory, charging him under Section A-6(e) of the Student Code of Conduct. Section A-6(e) prohibits "sexual [**5] assault." The University defines "sexual assault" as "any attempted or actual unwanted sexual behavior." Richard Carpinelli, Director of Judiciaries for the University, prepared the case for disposition at a judiciary hearing and eventually served as the "advisor" to the disciplinary hearing board. Around the same time, Mallory faced felony sexual battery charges in Athens County.

Mallory's disciplinary hearing began on April 2, 1998 and continued into the next day. Mallory's defense attorney was allowed to attend the disciplinary hearing, but was not allowed to participate. Instead, Mallory was "represented" by a fellow student. During the hearing, Mallory's student representative was limited to asking questions about the matters each witness discussed on direct. Mallory did not testify at the hearing because of the felony charge pending against him. The board did consider, however, a written statement that Mallory had given to the University Police the morning after the incident. The board also considered the accounts of eight witnesses, each of whom stated that DeLong did not appear capable of consenting to sexual intercourse. Many of these witnesses confirmed that Mallory was [**6] himself intoxicated, but that DeLong was by far more intoxicated. DeLong also made a statement at the hearing, relating that the last thing she remembered of that evening was being at one of the bars in Athens.

The disciplinary board found that Mallory violated Section A-6(e) and recommended his expulsion from the University. The board's "Rationale for Guilt" stated that DeLong's degree of intoxication was such "that the victim's judgment was so impaired that she would not have been capable of making rational decisions about her welfare; as such she could not have given consent to engage in sexual intercourse with the accused student." Mallory petitioned the University's president for review,

but the president upheld the board's decision and Mallory was expelled.

Mallory then brought an action against the University, alleging a violation of Title IX. 20 U.S.C. §§ 1681-1688. Mallory also brought state-law defamation actions against Ryan Davis, Bradley Pitcher, and Harris Pratsinakis (the "Students") for statements that each made in connection with the incident.¹ The University moved for summary judgment. The district court granted the University's motion, [**7] finding that Mallory had not demonstrated a genuine issue of material fact with regard to whether the University's actions were motivated [**638] by Mallory's sex. The district court then declined to exercise jurisdiction over the state-law defamation claims against the Students, and dismissed those claims without prejudice. Mallory now appeals.

1 Mallory also brought a number of other claims against other individuals in connection with this incident. The district court, for various reasons, dismissed the other claims. Mallory does not appeal the dismissal of the claims against the other parties.

I. The District Court Properly Granted the University's Motion for Summary Judgment.

Mallory's claim for damages against the University is based on Title IX, which reads in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [**8]" 20 U.S.C. § 1681(a). Neither party disputes that the University is a post-secondary educational institution that receives federal funds. Moreover, it is also clear that by expelling Mallory from the University as a result of the disciplinary process, the University has excluded Mallory from "participation in" its educational program. Here the key inquiry is whether Mallory has presented a genuine issue of material fact with regard to whether the University, in its initiation and prosecution of the disciplinary action, excluded Mallory because of his sex.

A. Standard of Review

We review a grant of summary judgment *de novo*, using the same standard as the district court. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000)

(citing *Cox v. Kentucky DOT*, 53 F.3d 146, 149 (6th Cir. 1995)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). To prevail, [**9] the nonmovant must show sufficient evidence to create a genuine issue of material fact. *See id.* (citing *Klepper v. First Am. Bank*, 916 F.2d 337, 341-42 (6th Cir.1990)).

B. Discussion

Neither the Supreme Court nor the Sixth Circuit has set forth a standard for determining when intentional discrimination has occurred in a case where a student has relied on Title IX to challenge either the initiation or the outcome of a disciplinary proceeding. Both parties and the district court viewed this case through the analytical framework provided in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994). In *Yusef*, the Second Circuit, analogizing from Title VII law, categorized Title IX claims against universities arising from disciplinary hearings into "erroneous outcome" claims and "selective enforcement" claims, both of which require a plaintiff to demonstrate that the conduct of the university in question was motivated by a sexual bias. *See id.* at 714-15.

On appeal, Mallory also asks this court to read two other Title IX intent standards--the "deliberate indifference" standard and the "archaic assumptions" standard--into the *Yusuf* [**10] framework. The "deliberate indifference" standard is applied where a plaintiff seeks to hold an institution liable for sexual harassment and requires the plaintiff to demonstrate that an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998). The "archaic assumptions" standard, which has been applied where plaintiffs seek equal athletic opportunities, finds discriminatory intent in actions resulting [**639] from classifications based upon archaic assumptions. *See Pederson v. La. State Univ.*, 213 F.3d 858, 880-82 (5th Cir.2000); *see also Horner ex rel. Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 693 n.4 (discussing the pre-hearing opinion in *Pederson*).

Even assuming *arguendo* that these standards apply, we conclude that Mallory failed to present a genuine

issue of material fact regarding whether the University's actions were motivated by Mallory's sex.

1. Erroneous Outcome

First, Mallory has not shown a genuine issue of material fact with regard to his claim that the [**11] outcome of University's disciplinary proceeding was erroneous because of sex bias. Mallory was charged under the University's Student Code for sexual assault, which is defined as any attempted or actual unwanted sexual behavior. Mallory argues that the only evidence at the disciplinary hearing regarding whether DeLong "wanted" to have sex was Mallory's written statement that indicated that DeLong initiated the sexual encounter. Therefore, the argument goes, DeLong was not sexually assaulted inasmuch as she initiated or "wanted" the sexual activity. Mallory argues that the hearing panel's focus upon whether DeLong was able to consent supports finding an erroneous outcome here because the University's definition of sexual assault does not extend to situations where the offender merely knows that the other person's ability to consent is impaired. Mallory argues that the University's focus on DeLong's, but not Mallory's, ability to consent in this instance reveals that the University holds an antiquated notion that "men are sexual aggressors and women are victims."

Mallory, however, has not offered any evidence that the University has ever limited itself in other cases to determining [**12] whether the alleged victim "wanted." rather than was incapable of consenting to, sexual activity--much less presented any evidence that the University has applied the former standard to a female who allegedly sexually assaulted someone. Absent such evidence, the University's decision to focus on the ability to consent merely demonstrates the University's policy decision to punish those who engage in sexual conduct with another person when the first person is aware of the other's inability to consent. This is a generally accepted view in Ohio that does not depend on a person's sex. *Cf.* Ohio Rev. Code § 2907.03 (detailing the crime of sexual battery to include sexual conduct with another when "the offender knows that the person's ability to appraise the nature of or control the other person's own conduct is substantially impaired"). Thus, although the University may (or may not) have erroneously interpreted "unwanted" in its Student Code to include "incapable of consenting," there is no evidence that this interpretation was discriminatorily applied or motivated by a

chauvinistic view of the sexes.

Mallory also argues that prejudicial procedures used at his disciplinary proceeding [**13] resulted in an erroneous outcome. Mallory claims (1) that he was denied the use of legal counsel at the hearing, (2) that his student advocate was prohibited from cross-examining witnesses who testified against him, and (3) that the scheduling of the hearing during the pendency of criminal proceedings against him prevented him from testifying on his own behalf. Mallory maintains that these deficiencies led to an erroneous outcome and were a result of discrimination against him based on his sex.

Mallory relies upon an affidavit from a former student, Aaron Zirkle, to demonstrate that the procedures used at the hearing were motivated by sexual bias. In April 1992, Zirkle was asleep in his room [*640] when a female student he had formerly dated entered and crawled into bed with Zirkle. Zirkle, afraid that his roommate would return, argued with the female and eventually agreed to return to the female's room if she promised only to sleep. When the two reached the female's room, the female started making sexual advances and Zirkle left. Zirkle later filed a report against the female under Section A(6) of the Student Code. Richard Carpinelli brokered a compromise between Zirkle and the female, [**14] and the compromise led Zirkle to withdraw his complaint. In a letter to Carpinelli, Zirkle complained about how Carpinelli treated him during the process: "I must assume you do not follow University policy and you think ... men cannot be violated More likely is as I mentioned earlier this hit some part of you and you do not feel that men can be abused and violated." J.A. at 567.

Mallory claims that the Zirkle affidavit demonstrates that Carpinelli, who, as the Director of Judiciaries for the University, was responsible for the allegedly flawed hearing procedures, held the biased view that "men cannot be violated." As the district court noted, the Zirkle complaint was filed six years prior to Mallory's disciplinary hearing and there are significant factual distinctions between the two. As the district court also rightly indicated, one case by an individual who was subjectively dissatisfied with a result does not constitute a "pattern of decision-making," referred to in *Yusuf* as a basis for finding bias. See *Yusuf*, 35 F.3d at 715; cf. *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917 (6th Cir. 1985) (noting that in pattern claims of discrimination [**15] under Title VII the plaintiff must demonstrate

that discrimination was "standard operating procedure") (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 52 L. Ed. 2d 396, 97 S. Ct. 1843(1977)). Other than the Zirkle incident, Mallory presents no evidence of any other male or female student accused of, or disciplined for, sexual assault. Mallory also presented no evidence of any voting member who has indicated that their decision was motivated by Mallory's sex. Nor has Mallory shown how Carpinelli influenced or attempted to influence the decision of the tribunal, as he was not even a voting member. There is no indication that Carpinelli interrupted the proceedings or wrongfully attempted to steer the result. Without any evidence that Carpinelli influenced the voting members to find against Mallory because of his sex, and without any indication that Carpinelli affected the proceedings in a significant way, Mallory has not demonstrated that a genuine issue of material fact exists with respect to his assertion of a sex-based erroneous outcome.

2. Selective Enforcement

Mallory has also failed to show a genuine issue of material fact with regard to [**16] his selective enforcement theory. Mallory alleges that he was the victim of selective enforcement of the University's prohibition against sexual assault. The focal point of this argument is that the incident report equally implicated both him and DeLong because they were both intoxicated while having sex. These circumstances, Mallory argues, presented a fair question about "who assaulted whom." Mallory asserts that the University's initial determination was driven by the "archaic assumption" that the woman, DeLong, was the victim and the man, Mallory, was the aggressor. This conclusion, Mallory argues, is supported by the Zirkle affidavit, which demonstrates the University's attitude that "men cannot be violated."

Mallory's selective enforcement argument, however, ignores that the initial incident report suggested that Mallory, although intoxicated, was sufficiently aware [*641] to recall the incident and that DeLong was probably unable to remember the event. In addition, upon being questioned by University Police early the morning after the incident, DeLong was unable to remember that she had had sex with Mallory the night before. This evidence, which was not based on the different sexes [**17] of the individuals, suggested that DeLong was not capable of consenting to sexual activity, and does nothing to establish that the University's initiation of an

investigation against Mallory was motivated by his sex.

Moreover, the only other evidence that Mallory presents to support his selective enforcement claim, the Zirkle affidavit, does not involve sufficiently similar facts to support a selective enforcement claim under *Yusuf*. To support a claim of selective enforcement, Mallory must demonstrate that a female was in circumstances sufficiently similar to his own and was treated more favorably by the University. See *Curto v. Smith*, 248 F. Supp.2d 132, 146-47 (N.D.N.Y. 2003) (dismissing a Title IX claim under *Yusuf* analysis for failure to state a selective enforcement claim where academically-expelled female sought to compare more favorable treatment of male who had been dismissed due to misconduct); cf. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (noting that for the purposes of a Title VII disparate treatment claim a plaintiff must prove that all relevant aspects of his situation are "nearly identical" to those [**18] of the female who he alleges was treated more favorably). The circumstances surrounding the Zirkle affidavit were significantly different from those here. The question there was whether Zirkle actually consented to sexual contact with another person with whom he had a history of consensual encounters. In contrast, here the question was whether DeLong was capable of consenting. Many witnesses stated that DeLong did not appear capable of consent. DeLong herself testified that she did not remember the encounter, suggesting that she was not able to consent. Given these differences, the Zirkle affidavit is not sufficiently similar to support a selective enforcement claim.

Consequently, we find that the district court properly determined that Mallory failed to present a genuine issue

of material fact regarding his selective enforcement claims under Title IX under either an erroneous result or a selective enforcement theory. The district court therefore properly granted summary judgment against Mallory on his Title IX claim against the University for initiating and prosecuting a disciplinary action against him.

II. The District Court Did Not Abuse Its Discretion By Dismissing the State-Law Defamation Claims.

[**19] Turning to the district court's dismissal of Mallory's remaining state-law claims, we conclude the district court appropriately dismissed without prejudice Mallory's state-law defamation claims. A district court's ruling declining supplemental jurisdiction will not be disturbed absent an abuse of discretion. See *Weeks v. Portage County Executive Offices*, 235 F.3d 275, 279-80 (6th Cir. 2000). The usual course is for the district court to dismiss state-law claims without prejudice if all federal claims are disposed of on summary judgment. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966) ("If the federal claims are dismissed before trial ... the state claims should be dismissed as well."). Because the district court properly granted summary judgment with regard to Mallory's only federal law claim, the district court did not abuse its discretion by declining to exercise jurisdiction over the remaining state law claims in this case.

[*642] CONCLUSION

For the foregoing reasons we affirm the judgment of the district court.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence¹

Title IX of the Education Amendments of 1972 ("Title IX")² is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.³

On April 4, 2011, the Office for Civil Rights (OCR) in the U.S. Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence ("DCL").⁴ The DCL explains a school's responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX.⁵ Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as a school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.

¹ The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf. The Office for Civil Rights (OCR) issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202.

² 20 U.S.C. § 1681 *et seq.*

³ Throughout this document the term "schools" refers to recipients of federal financial assistance that operate educational programs or activities. For Title IX purposes, at the elementary and secondary school level, the recipient generally is the school district; and at the postsecondary level, the recipient is the individual institution of higher education. An educational institution that is controlled by a religious organization is exempt from Title IX to the extent that the law's requirements conflict with the organization's religious tenets. 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a). For application of this provision to a specific institution, please contact the appropriate OCR regional office.

⁴ Available at <http://www.ed.gov/ocr/letters/colleague-201104.html>.

⁵ Although this document and the DCL focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.

should also explain to the student (again, before the student reveals information that he or she may wish to keep confidential) that, although the RA must report the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location to the Title IX coordinator or other appropriate school designee, the school will protect the student's confidentiality to the greatest extent possible. Prior to providing information about the incident to the Title IX coordinator or other appropriate school designee, the RA should consult with the student about how to protect his or her safety and the details of what will be shared with the Title IX coordinator. The RA should explain to the student that reporting this information to the Title IX coordinator or other appropriate school designee does not necessarily mean that a formal complaint or investigation under the school's Title IX grievance procedure must be initiated if the student requests confidentiality. As discussed in questions E-1 and E-2, if the student requests confidentiality, the Title IX coordinator or other appropriate school designee responsible for evaluating requests for confidentiality should make every effort to respect this request and should evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students.

Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. If a student discloses sexual violence to an RA who is a responsible employee, the school will be deemed to have notice of the sexual violence even if the student does not file a Title IX complaint. Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.

✓ **E. Confidentiality and a School's Obligation to Respond to Sexual Violence**

E-1. How should a school respond to a student's request that his or her name not be disclosed to the alleged perpetrator or that no investigation or disciplinary action be pursued to address the alleged sexual violence?

✓ **Answer:** Students, or parents of minor students, reporting incidents of sexual violence sometimes ask that the students' names not be disclosed to the alleged perpetrators or that no investigation or disciplinary action be pursued to address the alleged sexual violence. OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request



for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence. Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. In the case of minors, state mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school's response to incidents of sexual violence.²⁵

Even if a student does not specifically ask for confidentiality, to the extent possible, a school should only disclose information regarding alleged incidents of sexual violence to individuals who are responsible for handling the school's response. To improve trust in the process for investigating sexual violence complaints, a school should notify students of the information that will be disclosed, to whom it will be disclosed, and why. Regardless of whether a student complainant requests confidentiality, a school must take steps to protect the complainant as necessary, including taking interim measures before the final outcome of an investigation. For additional information on interim measures see questions G-1 to G-3.

For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator. The school should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials. When a school knows or reasonably should know of possible retaliation by other students or third parties, including threats, intimidation, coercion, or discrimination (including harassment), it must take immediate

²⁵ The school should be aware of the alleged student perpetrator's right under the Family Educational Rights and Privacy Act ("FERPA") to request to inspect and review information about the allegations if the information directly relates to the alleged student perpetrator and the information is maintained by the school as an education record. In such a case, the school must either redact the complainant's name and all identifying information before allowing the alleged perpetrator to inspect and review the sections of the complaint that relate to him or her, or must inform the alleged perpetrator of the specific information in the complaint that are about the alleged perpetrator. See 34 C.F.R. § 99.12(a) The school should also make complainants aware of this right and explain how it might affect the school's ability to maintain complete confidentiality.

and appropriate steps to investigate or otherwise determine what occurred. Title IX requires the school to protect the complainant and ensure his or her safety as necessary. See question K-1 regarding retaliation.

If the student still requests that his or her name not be disclosed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence. As discussed in question C-3, the Title IX coordinator is generally in the best position to evaluate confidentiality requests. Because schools vary widely in size and administrative structure, OCR recognizes that a school may reasonably determine that an employee other than the Title IX coordinator, such as a sexual assault response coordinator, dean, or other school official, is better suited to evaluate such requests. Addressing the needs of a student reporting sexual violence while determining an appropriate institutional response requires expertise and attention, and a school should ensure that it assigns these responsibilities to employees with the capability and training to fulfill them. For example, if a school has a sexual assault response coordinator, that person should be consulted in evaluating requests for confidentiality. The school should identify in its Title IX policies and procedures the employee or employees responsible for making such determinations.

If the school determines that it can respect the student's request not to disclose his or her identity to the alleged perpetrator, it should take all reasonable steps to respond to the complaint consistent with the request. Although a student's request to have his or her name withheld may limit the school's ability to respond fully to an individual allegation of sexual violence, other means may be available to address the sexual violence. There are steps a school can take to limit the effects of the alleged sexual violence and prevent its recurrence without initiating formal action against the alleged perpetrator or revealing the identity of the student complainant. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school's policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests.

CHRISTOPHER HAVLIK, Plaintiff, v. JOHNSON & WALES UNIVERSITY, Defendant.

CA 05-510 ML

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

490 F. Supp. 2d 250; 2007 U.S. Dist. LEXIS 34690

May 11, 2007, Decided
May 11, 2007, Filed

SUBSEQUENT HISTORY: Affirmed by Havlik v. Johnson & Wales Univ., 2007 U.S. App. LEXIS 28075 (1st Cir. R.I., Dec. 5, 2007)

CASE SUMMARY:

PROCEDURAL POSTURE: Based on a crime alert that identified plaintiff university student as an assailant, the student sued defendant university for defamation and breach of contract. The university moved for summary judgment.

OVERVIEW: The university averred that the Crime Alert accurately reflected what was communicated to the police and to the campus safety officer. The court found that the university was privileged to publish the Crime Alert where it was required to do so by federal law, specifically the Clery Act, 20 U.S.C.S. § 1092(f), where the location of the incident was within the same reasonably contiguous geographic area of the university and was "adjacent" to a facility owned or controlled by the university, and thus, because the incident occurred in an area that met the statutory definition of the term "public property" it met the Act's requirement for the location of a reportable offense. Moreover, since it was readily apparent that the victim, as a result of being punched by the student, suffered a severe or aggravated bodily injury, the victim was a victim of an aggravated assault within the meaning of 20 U.S.C.S. §§ 1092(f)(1)(F)(i)(IV) & (f)(3). The student failed to set forth specific facts showing that there was a genuine issue of material fact concerning whether ill will was the primary motivating factor in the university's publishing of the Crime Alert.

OUTCOME: The university's motion for summary judgment was granted.

COUNSEL: [**1] For Christopher Havlik, Plaintiff: John R. Mahoney, LEAD ATTORNEY, Asquith, Mahoney LLP, Providence, RI.

For Johnson & Wales University, Defendant: John A. Tarantino, LEAD ATTORNEY, Katy A. Hynes, LEAD ATTORNEY, Paul V. Curcio, LEAD ATTORNEY, Adler, Pollock & Sheehan, PC, Providence, RI.

JUDGES: Mary M. Lisi, Chief United States District Judge.

OPINION BY: Mary M. Lisi

OPINION

[*252] MEMORANDUM AND ORDER

This case is before the Court on a motion for summary judgment filed by Defendant, Johnson & Wales University ("JWU") pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, Defendant's motion is granted.

I. Standard of Review

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the pertinent evidence is such that a rational factfinder could resolve the issue in favor of either party, and a [**2] fact is "material" if it "has the capacity to sway the outcome of the litigation under the applicable law." National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995).

The moving party bears the burden of showing the Court that no genuine issue of material fact exists. *Id.* Once the movant has made the requisite showing, the

nonmoving party "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Court views all facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *Continental Casualty Co. v. Canadian Universal Insurance Co.*, 924 F.2d 370 (1st Cir. 1991).

II. Facts

At approximately 12:00 a.m. on Friday, September 17, 2004, an altercation occurred between two JWU students in the area of Richmond and Pine Streets in Providence. During the altercation, Christopher Havlik ("Plaintiff") "threw a punch" and struck Donald Ratcliffe ("Ratcliffe"). Defendant's Motion for Summary Judgment Ex. 4. As a result of being struck, [*3] Ratcliffe fell and suffered a fractured skull and a concussion. The Providence Police responded to the incident and identified Elyse Okolita ("Okolita") as a one of the witnesses to the incident.

An officer from JWU's Department of Campus Safety and Security ("Campus Safety") conducted an internal investigation [*253] into the incident. On September 17, 2004, at approximately 12:10 p.m., the officer spoke to John Curely ("Curely"), another witness to the incident, and produced an "incident report." According to Curely, Plaintiff "swung" at him missing Okolita "by inches. He swung again, and struck Ratcliff[e] in the head. Ratcliff[e] fell to the ground, striking his head on the concrete." Defendant's Reply Memorandum Ex. 3. Curely stated that he "freaked out" because "blood was coming out of Ratcliff[e]'s left ear." Id. Curely also stated that Plaintiff "flashed a knife during the altercation." Id. On Monday, September 20, 2004, JWU's Student Conduct Office issued Plaintiff a temporary notice of suspension from JWU alleging "[a]ssault of another student, alleged possession of a knife, [and] [c]onduct that would violate federal, state or local laws." Defendant's Motion [*4] for Summary Judgment Ex. 6. The notice advised Plaintiff that the suspension was temporary pending a student conduct review hearing.

On Tuesday, September 21, 2004, at approximately 10:50 a.m., Okolita provided a witness statement to the Providence Police about the incident. Okolita stated that Plaintiff "just threw a punch past me and knocked [Ratcliffe] out. [Ratcliffe] went straight back. [Plaintiff] had a pocket knife in one of his hands." Defendant's Motion for Summary Judgment Ex. 4. At approximately 11:15 a.m. on the same day, the Student Conduct Office held a student conduct review hearing regarding the September 17 incident. Plaintiff explained his version of the altercation to the student conduct hearing panel. The hearing panel also heard from two witnesses presented by Plaintiff. On the same day, at approximately 4 p.m.,

Campus Safety posted a notice concerning the incident between Plaintiff and Ratcliffe. The notice, titled "CRIME ALERT" and "ASSAULT" stated that

[o]n Friday, September 17, 2004, at 12:00 am, [sic] three students were walking on Pine Street (heading towards the Providence Performing Arts Center) after leaving Club Ultra. The three students [**5] were approached by two students who are ZBT fraternity members. The ZBT fraternity members were angry that the two students had chosen not to join the fraternity. After a verbal altercation, one student was struck and fell to the ground. The student sustained a head injury when he fell to the ground. The victims stated that a knife was shown during the incident. The assailant was identified as Christopher Havlik. Providence Police were notified

Defendant's Motion for Summary Judgment Ex. 8.

At some point before the Crime Alert was issued, Barbara Bennet ("Bennet"), general counsel for JWU, suggested that the Crime Alert refer specifically to Plaintiff by name and also list his fraternity membership. At the time Campus Safety issued the Crime Alert, it did not know what had transpired at Plaintiff's student conduct hearing. On Wednesday, September 22, 2004, Plaintiff received a letter from the Student Conduct Office notifying him of the hearing panel's decision finding him "responsible" for "[a]ssault of another student" and "[c]onduct that would violate federal, state or local laws" but "not responsible" for "alleged possession of a knife." Defendant's Motion for [*6] Summary Judgment Exs. 6, 9. As a result of the hearing panel's decision, Plaintiff was dismissed from JWU. The letter also stated that Plaintiff could appeal the dismissal decision "in writing within two . . . business days. . . ." and that his appeal officer was Veera Sarawgi ("Sarawgi"). Id. at Ex. 9. The letter specifically informed Plaintiff that his "[a]ppeal [o]fficer must receive [his] appeal letter no later than 4 p.m." on September 26. Id.

[*254] On September 22 Plaintiff and his mother initiated a meeting with JWU's Vice President of Student Affairs, Ronald Martel ("Martel").¹ At this meeting Martel accused Plaintiff of lying and used the word "thugs" to describe the members of Plaintiff's fraternity. Plaintiff's Opposition to Motion for Summary Judgment, Martel Deposition at 27. At some point after this meeting Plaintiff exercised his right to appeal the decision of the hearing panel.² In spite of the appeal instructions con-

tained in the hearing panel's decision, Plaintiff forwarded his appeal letter to Martel. Martel then forwarded the letter to Sarawgi by interoffice mail. Plaintiff's letter was received by the Office of Student Affairs on September 27, 2004. Before [**7] deciding Plaintiff's appeal, Sarawgi asked Martel if he saw any reason why Plaintiff should not be dismissed from JWU. Martel informed Sarawgi that he "did not." Plaintiff's Opposition to Motion for Summary Judgment, Martel Deposition at 48. On September 29, 2004, Sarawgi affirmed Plaintiff's dismissal from JWU.

1 At oral argument on the motion for summary judgment, Plaintiff's counsel clarified that the meeting was initiated by Plaintiff and his mother. Martel's title, according to his deposition, is Vice President of Student Affairs, however, both parties refer to him as a Dean.

2 There is some dispute about whether Plaintiff filed his appeal before or after he met with Martel to discuss the incident. For purposes of this memorandum and order, the Court adopts Plaintiff's version of events as clarified at oral argument on the motion for summary judgment.

Plaintiff was charged with assault by the Providence Police Department. A state district court judge found Plaintiff guilty and sentenced Plaintiff [**8] to one year of probation and twenty-five hours of community service. Plaintiff appealed the district court decision to the state superior court. In May 2005 the matter was tried before a jury and the jury returned a verdict of not guilty. Plaintiff now sues JWU for defamation and breach of contract.

III. Analysis

A. Defamation

Plaintiff first contends that the Crime Alert published by JWU is defamatory. In a defamation suit under Rhode Island law, "the plaintiff must prove: (1) the utterance of a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence; and (4) damages." *Mills v. C.H.I.L.D., Inc.*, 837 A.2d 714, 720 (R.I. 2003). "A defamatory statement consists of [a]ny words, if false and malicious, imputing conduct which injuriously affects a [person's] reputation, or which tends to degrade him [or her] in society or bring him [or her] into public hatred and contempt. . . ." *Wilkinson v. State Crime Lab. Comm'n.*, 788 A.2d 1129, 1142 (R.I. 2002) (internal quotation marks and citation omitted). "[W]hether a particular statement or conduct alleged [**9] to be defamatory is, in fact, defamatory is a question of law for the court to decide." *Alves v. Hometown*

Newspapers, Inc., 857 A.2d 743, 750 (R.I. 2004). Truth is an absolute defense. *Lundgren v. Pawtucket Firefighters Ass'n Local No. 1261*, 595 A.2d 808, 815 (R.I. 1991).

Plaintiff argues that the Crime Alert is defamatory because (1) it identified him as the "assailant, or the one who perpetrated" a crime; (2) it provided an inaccurate motive for the alleged assault; (3) it "makes reference to the fact that a knife was used during the incident" in spite of the finding by JWU that Plaintiff was found "not responsible" for "using" a knife;³ and (4) it [*255] identified several individuals as victims. Plaintiff's Opposition to Summary Judgment at 4-5. JWU avers that the Crime Alert accurately reflects what was communicated to the Providence Police and to the Campus Safety officer. Consequently, JWU concludes that the statements contained in the Crime Alert are true and as such are not defamatory.

3 Although Plaintiff argues that the Crime Alert "makes reference to the fact that a knife was used during the incident" the Crime Alert actually states that a "knife was shown during the incident." Defendant's Motion for Summary Judgment Ex. 8. Additionally, JWU found Plaintiff "not responsible" for possession of a knife, not "using" a knife. *Id.* at Exs. 6, 9.

[**10] For purposes of this decision the Court assumes without deciding that the Crime Alert is defamatory. See *Kevorkian v. Glass*, 913 A.2d 1043, 1047 (R.I. 2007) (assuming without deciding that the phrase used by defendant was defamatory). The Court does so, however, because JWU's publication of the Crime Alert was covered by a qualified privilege. *Id.* It is well settled in Rhode Island that "[t]he publisher of an allegedly defamatory statement may avoid liability if he or she is privileged to make the statement in question." *Mills*, 837 A.2d at 720; see also *Kevorkian*, 913 A.2d at 1049. "The determination of whether the privilege exists on the facts of a particular case is a question of law for the court to decide." *Mills*, 837 A.2d at 720. A qualified privilege

permits a person to escape liability for a false and defamatory statement made about another if the occasion for the publication is such that a publisher acting in good faith correctly or reasonably believes that he has a legal, moral or social duty to speak out, or that to speak out is necessary to protect either his own interests, or those of third [**11] person[s], or certain interests of the public.

Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 247 A.2d 303, 305-306 (R.I. 1968).

JWU avers that it published the Crime Alert because it was required to do so by federal law, specifically the Clery Act ("Act"). See 20 U.S.C. § 1092(f). Plaintiff contends that JWU was not legally required to publish the Crime Alert, and consequently, is not protected by the qualified privilege. The Act "requires United States colleges and universities to collect and publish data on student safety, campus security policies, and campus crime statistics." *Allocco v. City of Coral Gables*, 221 F. Supp. 2d 1317, 1348 n.12 (S.D. Fla. 2002), *aff'd*, 88 Fed. Appx. 380 (11th Cir. 2003); see also Bonnie S. Fisher, *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 *Stetson L. Rev.* 61 (2002). The Act also mandates that all universities and colleges in the United States that participate in federal student financial assistance programs

shall make timely reports to the campus community on crimes considered to be a threat to [**12] other students and employees. . . . that are reported to campus security or local law police agencies. Such reports shall be provided to students and employees in a manner that is timely and that will aid in the prevention of similar occurrences.

20 U.S.C. § 1092(f)(3) (emphasis added). The Act requires that JWU issue timely reports for the following crimes that are reported to campus security or to the police: murder, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, arson, and certain liquor, drug, and weapons violations. 20 U.S.C. §§ 1092(f)(3) & (f)(1)(F)(i). In order to meet the reporting requirement, however, the crime must occur "on campus . . . [or] on public property . . ." *Id.* § 1092(f)(1)(F). It is JWU's position that the Crime Alert was a timely report made pursuant to the Act.

Plaintiff first argues that JWU was not required by the Act to publish the Crime [**256] Alert because it is unclear where the incident occurred. JWU avers that the incident was a reportable offense because it occurred in an area defined as "public property" by the Act. JWU argues that the incident occurred [**13] at the sidewalk in front of 25 Richmond Street. Plaintiff does not identify the exact location of the incident but avers that the incident took place "on a sidewalk on Richmond Street that was either adjacent to a lot owned by [JWU] or Griffin Realty Enterprises, Inc." ("Griffin Realty"), a wholly owned subsidiary of JWU. Plaintiff's Supplemental Memorandum at 2.

The Act defines the term "public property" as

all public property that is within the same reasonably contiguous geographic area of the institution, such as a sidewalk, a street, other thoroughfare, or parking facility, and is adjacent to a facility owned or controlled by the institution if the facility is used by the institution in direct support of, or in a manner related to the institution's educational purposes.

20 U.S.C. § 1092(f)(6)(A)(iii) (emphasis added). In determining the meaning of a statute, the Court begins with its language. *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). The Court construes the language of a statute "in its context and in light of the terms surrounding it." *Id.* at 23 (internal quotation marks and [**14] citation omitted). The plain meaning of a statute's text must be given effect "unless it would produce an absurd result or one manifestly at odds with the statute's intended effect. . . ." *Seahorse Marine Supplies, Inc. v. Puerto Rico Sun*, 295 F.3d 68, 74 (1st Cir. 2002).

The police report identifies the location of the incident as "[h]ighway/[r]oad/[a]lley" at 25 Richmond Street. Defendant's Motion for Summary Judgment Ex. 1. Okolita's witness statement avers that the incident occurred while "on the sidewalk near the police substation (Richmond and Pine)." *Id.* at Ex. 4 (emphasis added) (capitals omitted). Ratcliffe's witness statement avers that the incident occurred while "standing on the sidewalk on Richmond St. near Pine St. . . . I fell back and hit my head on the sidewalk." *Id.* at Ex. 3 (emphasis added) (capitals omitted). JWU's incident report identifies the location of the incident as "[o]ff [c]ampus . . . [i]n [f]ront of 25 Richmond St[.]" Defendant's Reply Ex. 3.

Although the parties dispute the exact location of the incident, it is clear that the incident took place on the sidewalk of Richmond Street near Pine Street in [**15] Providence. The parties agree that the location of the incident is a portion of the sidewalk on Richmond Street that is adjacent to property made up of one parcel of land owned by JWU and eight parcels of land owned by Griffin Realty. The nine parcels of land make up what JWU refers to as the Richmond Lot. JWU uses the Richmond Lot for the primary purpose of providing free parking for JWU employees. The sidewalk on Richmond Street adjacent to the Richmond Lot is within the same reasonably contiguous geographic area of JWU. † See 20 U.S.C. § 1092(f)(6)(A)(iii). [**257] JWU controls the Richmond Lot and has engaged a third party to manage it. The Richmond Lot also contains parking spaces for paid transient parking. Of the 178 spaces in the Richmond Lot, in

September 2004, approximately 127 spaces were allocated for JWU employees. With respect to the remaining spaces allocated to transient parking, in September 2004, at least ninety percent of those spaces were used by JWU students.⁵ JWU students and employees use the Richmond Lot and Richmond Street sidewalks on a daily basis during the academic year. Campus Safety patrols the Richmond Lot and Richmond Street sidewalks. [**16]

4 Plaintiff argues that the location of the incident, the sidewalk on Richmond Street adjacent to the Richmond Lot, is not in the same reasonably contiguous geographic area of JWU. See 20 U.S.C. § 1092(f)(6)(A)(iii). Plaintiff's argument ignores the fact that JWU's Providence campus is in an urban setting. The Act provides that the term "public property" means, inter alia, all public property that is within "the same reasonably contiguous geographic area [of JWU], such as a sidewalk . . ." Id. (emphasis added). Contiguous means "touching; in contact" or "in close proximity without actually touching; near." Random House Unabridged Dictionary 439 (2d ed. 1993). The Court has reviewed the street maps submitted by the parties which identify both the applicable area of Richmond Street and the location of nearby JWU campus facilities. The area where the incident occurred is certainly in close proximity to JWU's dispersed urban campus. Additionally, the Richmond Lot borders four separate parcels of land maintaining JWU campus facilities.

5 Consequently, in September 2004, approximately ninety-six percent of the available parking spaces in the Richmond Lot were used by JWU employees or students.

[**17] It is clear that the location of the incident, the Richmond Street sidewalk, is within the "same reasonably contiguous geographic area" of JWU and is "adjacent"⁶ to the Richmond Lot, a "facility owned or controlled" by JWU.⁷ See 20 U.S.C. § 1092(f)(6)(A)(iii) (emphasis added). The record reflects that the Richmond Lot is used by JWU for the primary benefit of its employees and students "in direct support of, or in a manner related to the institution's educational purposes." 20 U.S.C. § 1092(f)(6)(A)(iii); see generally, Trustees of Tufts College v. Medford, 415 Mass. 753, 616 N.E.2d 433, 436 (Mass. 1993) (proposed parking garage was for an educational purpose because it was located in "core . . . area" of college campus); Martin v. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 747 N.E.2d 131, 138 (Mass. 2001) (citing Trustees of Tufts College for same proposition); Regents of University of New Mexico v. Hughes, 114 N.M. 304, 838 P.2d 458, 467 (N.M. 1992) ("any

such adjacent land must be used for school purposes, which may include the parking of vehicles used [**18] by students in attending classes or otherwise participating in educational or instructional activities"). The Court concludes that the incident occurred in an area that meets the statutory definition of the term "public property" and thus [*258] meets the Acts requirement for the location of a reportable offense.

6 Adjacent means "lying near, close, or contiguous; adjoining; neighboring. . . ." Random House Unabridged Dictionary 25 (2d ed. 1993).

7 The record reflects that the Richmond Lot is owned both by JWU and Griffin Realty, a wholly owned subsidiary of JWU. Plaintiff argues that Griffin Realty is a separate and distinct corporation from JWU, and as such, should not be included in JWU's corporate umbrella when determining JWU's obligations under the Act. Plaintiff argues that the Court should not ignore the existence of Griffin Realty as a separate legal entity with a separate corporate purpose. The Act provides that in order to meet the requirements of the term "public property" the property, inter alia, must be "adjacent to a facility owned or controlled" by JWU. 20 U.S.C. § 1092(f)(6)(A)(iii) (emphasis added). JWU has provided an affidavit from Christopher Placco, the Vice President of Facilities Management for the Providence Campus of JWU, which not only provides that Griffin Realty is a wholly owned subsidiary of JWU but that JWU "controls the Richmond Lot . . ." Placco Affidavit P 8 (emphasis added). The affidavit submitted by the President of Metropark, Ltd., the third party manager of the Richmond Lot, states that "Metropark manages the Richmond Lot on behalf of [JWU]." Meyers Affidavit P 2. Plaintiff has not submitted any evidence to create a genuine issue of fact with regard to whether or not JWU controls the Richmond Lot, consequently the Court need not consider the impact, if any, of Griffin's corporate status as a wholly owned subsidiary of JWU.

[**19] Plaintiff next argues that because the Crime Alert stated that the altercation was an assault JWU was not required by the Act to issue a timely report of the incident. JWU avers that it was required to issue the Crime Alert under the Act because Plaintiff committed an aggravated assault on Ratcliffe.

The Act requires JWU to issue timely reports for, inter alia, incidents of aggravated assault. 20 U.S.C. §§ 1092(f)(1)(F)(i)(IV) & (f)(3). The statute however, does not define the term "aggravated assault." Where a statute "is silent or ambiguous with respect to the specific issue

the court must defer to the agency's permissible construction of the statute." *Dunn v. United States Department of Agriculture*, 921 F.2d 365, 367 (1st Cir. 1990) (internal quotation marks and citation omitted). "[I]nterpretations of an agency concerning statutes it administers are entitled to extreme deference." *Phoenix-Griffin Group II, Ltd. v. Chao*, 376 F. Supp. 2d 234, 239 (D.R.I. 2005). The regulations adopted by the United States Department of Education pursuant to the Act define "aggravated assault" as

[a]n unlawful attack by one [**20] person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)

34 C.F.R. § 668, Subpart D, Appendix A (emphasis added); see also 34 CFR §§ 668.46(c)(1); (c)(7); & (e).

Although the incident was labeled by police as a simple assault, the police report also reflects the severity of Ratcliffe's injuries by noting the Ratcliffe was transported by rescue from the scene to Rhode Island Hospital. The incident report produced by the Campus Safety officer noted that, as a result of the incident, Ratcliffe was diagnosed with a "concussion and skull fracture" and that if he sustained a "another blow to the head in the area of the fracture, the resulting injury could be fatal." Defendant's Reply Memorandum at Ex. 3. The Crime Alert was titled "ASSAULT" but, like the police report and incident [**21] report, it also contained references to the severity of Ratcliffe's injuries by reporting that "one student was struck and fell to the ground. The student sustained a head injury when he fell to the ground." Defendant's Motion for Summary Judgment Ex. 8.

It is readily apparent that Ratcliffe, as a result of being punched by Plaintiff, suffered a "severe or aggravated bodily injury." See 34 C.F.R. § 668, Subpart D, Appendix A. The Court finds that Ratcliffe was a victim of an aggravated assault as defined by the Act. The Court therefore concludes that the incident was a reportable crime pursuant to the Act. Finding that both the nature of the altercation and its location meet the reporting requirements of the Act, the Court concludes that JWU had a legal duty to publish the Crime Alert.

Because the Court has concluded that JWU had a legal duty to publish the Crime Alert, it follows that JWU was covered by the qualified privilege. Plaintiff, however, attempts to overcome JWU's qualified privilege by arguing that there is sufficient evidence in the record to show that JWU published the Crime Alert with ill will directed towards Plaintiff. "A privileged communication is, by [**22] definition, made in good faith." *Mills*, 837 A.2d at 720. In order to overcome the qualified [**259] privilege, Plaintiff "must show that the primary motivating force for the communication was the publisher's ill will or spite toward him." *Ponticelli*, 247 A.2d at 308 (emphasis added).

"Although it is true that, [w]hether ill will or spite is the incentive for a publication is . . . a fact question and is ordinarily for the fact-finder to decide . . . to overcome a motion for summary judgment based on a qualified privilege, a plaintiff must point to some specific facts in the record that raise a genuine issue relative to the existence of such ill will."

Kevorkian, 913 A.2d at 1049 (internal quotation marks, citation and footnote omitted).

Plaintiff argues that JWU's ill will in publishing the Crime Alert is evidenced by Martel's labeling him a liar and, by association, a "thug" during Plaintiff's meeting with Martel. The particular conversation to which Plaintiff refers occurred after the Crime Alert was published; consequently, any argument that it shows or supports an inference of ill will in publishing the Crime [**23] Alert is a non-starter. Even if it somehow could support an inference of ill will, there is no indication in the record that Martel was involved in the decision to publish the Crime Alert. Since Martel's comments occurred after the publication of the Crime Alert they could not have been the primary motivating force in the decision to publish the Crime Alert. See *Ponticelli*, 247 A.2d at 308.

Plaintiff also argues that ill will is shown by Bennett suggesting that the Crime Alert include Plaintiff's name and his fraternity membership. Plaintiff argues that JWU published other Crime Alerts involving JWU students that did not reveal the alleged assailant's name. First, with respect to the reference to Plaintiff's fraternity membership, Bennet stated in her deposition testimony that at the time she reviewed the draft Crime Alert she was aware of two other incidents in the prior year that involved members of fraternities threatening or assaulting students. One of those prior incidents involved a member of the fraternity to which Plaintiff belonged. As a result, Bennet considered whether the incident involv-

ing Plaintiff, and by association his fraternity, "represented [**24] a continuing threat or a threat to the University community." Plaintiff's Opposition to Summary Judgment, Bennet Deposition at 7. Bennet's testimony on this point is not contradicted by any other evidence in the record. Thus, JWU's decision to include the name of the fraternity to which Plaintiff belonged in the Crime Alert was not primarily motivated by ill will. See Ponticelli, 247 A.2d at 308.

Plaintiff also argues that JWU's ill will is shown by the inclusion of his name in the Crime Alert. Martel stated in his deposition testimony that he was aware of approximately five Crime Alerts involving JWU students that did not identify the JWU students by name. In her deposition, Bennet clarified Martel's statement and explained that, for all of the instances that Martel identified except one, the identity of the alleged assailant as a JWU student was not known until after the Crime Alert was published.⁸ Bennet did identify an instance in 2003 when a Crime Alert was published that included the name of a JWU student as an alleged assailant. Bennet stated that in discussing whether the Crime Alert should identify the Plaintiff by name she "decided that it made the [**25] most sense to identify [Plaintiff] by name because we knew who he was." Plaintiff's Opposition to Summary Judgment, [*260] Bennet Deposition at 4. Reviewing the facts in the light most favorable to Plaintiff, the Court can reach only one plausible conclusion as to why Plaintiff's name appeared in the Crime Alert: JWU knew it. Further, it is undisputed that the reason that previous Crime Alerts did not include the name of a JWU student as the assailant was because it was not known that the assailant was a JWU student at the time of publication of the Crime Alert. This is reasonable considering JWU's duty to issue an alert in a timely manner in order to adequately warn students and employees of a potential safety threat. See 20 U.S.C. § 1092(f)(3).

[I]t is axiomatic that a party opposing a motion for summary judgment will not be allowed to rely upon mere allegations or denials in [the] pleadings. Rather, by affidavit or otherwise [the opposing party has] an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact."

Kevorkian, 913 A.2d 1049 (internal quotation marks and citation omitted). [**26] Plaintiff has failed to set forth specific facts showing that there is a genuine issue of material fact concerning whether ill will was the primary motivating factor in JWU's publishing of the Crime Alert. If there was any ill will -- and it is by no means clear that there was -- it was "merely incidental rather

than motivating." *Swanson v. Speidel Corp.*, 110 R.I. 335, 293 A.2d 307, 311 (1972). Consequently, Plaintiff's attempt at overcoming JWU's qualified privilege fails. The Court finds that JWU is entitled to judgment as a matter of law with respect to the defamation claim.⁹

8 At the time of her deposition, Bennet had not yet had the opportunity to review the files relating to the one remaining Crime Alert.

9 As a result of the Court's decision, the Court need not address Plaintiff's punitive damages claim.

B. Breach of Contract

At oral argument on the motion for summary judgment, counsel for Plaintiff clarified for the Court that the breach of contract claim was limited to the manner in which [**27] JWU handled the appeal. Specifically, Plaintiff argues that JWU breached the duty of good faith and fair dealing when Martel spoke to Sarawgi and told her "all about the case" before she rendered her decision. Plaintiff's Opposition to Summary Judgment at 12. Plaintiff avers that his reasonable expectation was that the appellate officer assigned to his appeal would not be improperly influenced by a conversation with "the Dean of students who had already prejudged [Plaintiff] as a liar, and by association, a 'thug.'" *Id.* at 13. Plaintiff cites *Mangla v. Brown University*, 135 F.3d 80 (1st Cir. 1998), in support of his argument. JWU avers that Plaintiff's allegations do not support a claim for breach of contract.

"The student-college relationship is essentially contractual in nature." *Mangla*, 135 F.3d at 83. The terms of the contract may include statements made in student handbooks or manuals. *Id.*; see also *Gorman v. St. Raphael Academy*, 853 A.2d 28 (R.I. 2004). The proper standard for interpreting contractual terms between a university and a student is that of "reasonable expectation -- what meaning the party making the manifestation, [**28] the university, should reasonably expect the other party to give it." *Mangla*, 135 F.3d at 83 (internal quotation marks and citation omitted). Courts must construe contracts for private education "in a manner that leaves the [university] administration broad discretion to meet its educational . . . responsibilities." *Gorman*, 853 A.2d at 34. "Private schools must have considerable [**261] latitude to formulate and enforce their own rules to accomplish their academic and educational objectives." *Id.* at 39.

"Under Rhode Island law, contracts contain an implied duty of good faith and fair dealing." *Mangla*, 135 F.3d at 84.¹⁰ In determining whether a party has breached the implied covenant of good faith and fair dealing the Court must decide "whether or not the ac-

tions in question are free from arbitrary or unreasonable conduct." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 66 F. Supp. 2d 317, 329 (D.R.I. 1999), *aff'd*, 217 F.3d 8 (1st Cir. 2000). "The implication of the duty is that the parties will act in a manner consistent with the purposes of the contract." *LifeSpan Physicians Professional Services Org., Inc. v. Combined Insurance Co. of America*, 345 F. Supp. 2d 214, 225 (D.R.I. 2004). [**29]

10 Because neither party contends otherwise, the Court assumes without deciding that the duty of good faith and fair dealing applies to the student-private university relationship. See generally *Mangla*, 135 F.3d 80 (assuming for sake of argument that the duty of good faith and fair dealing applied to a university admission's decision).

The JWU student handbook provides that, in order to request an appeal, a student must submit his request "in writing, by hand delivery or certified mail, to the appeal officer designated in the Conduct Review Notification and Record." Defendant Motion for Summary Judgment Ex. 13 at 22. In this case the Student Conduct Office's notification of its decision clearly identified Sarawgi as the appeal officer and noted that the "appeal officer must receive [the] appeal letter" by September 26. *Id.* at Ex. 9. For reasons unclear to the Court, Plaintiff sent his appeal letter to Martel instead of Sarawgi. Martel, however, forwarded the notice of appeal to Sarawgi [**30] and the Student Affairs Office received it on September 27. Sarawgi subsequently reviewed Plaintiff's appeal and issued her decision on September 29, 2004.

With respect to his conversation with Sarawgi, Martel testified in his deposition that Sarawgi "wanted specifics of the case, what transpired which I indicated to her in the folder, the Incident Reports were pretty clear, the decision of the panel was pretty straight forward, and did she [sic] see any reason why this individual should not be dismissed from the University; and I indicated no, I did not." Plaintiff's Opposition to Summary Judgment, Martel Deposition at 47-48. Martel stated that the "folder" Sarawgi would have received included the incident report, the hearing notification, the hearing procedure and the final decision by the hearing officers.

Although Plaintiff argues that Martel interfered with the appeal process, Martel's "involvement" in the process, if any, was not significant and was precipitated by Plaintiff's own actions, i.e., Plaintiff initiated the meeting with Martel and mistakenly sent his notice of appeal to Martel. Plaintiff argues that it was improper for Sarawgi to speak to Martel, particularly [**31] after Martel had labeled Plaintiff a liar and a thug. The record, however, does not reflect that Martel made these comments to Sarawgi nor does the record reflect that Sarawgi had any

knowledge of Martel's particular characterizations of Plaintiff when she made her decision. Plaintiff has presented no more than a conclusory allegation to support his claim that Sarawgi was somehow improperly influenced or predisposed to rule against him as a result of Martel's characterizations of Plaintiff. "Mere allegations, or conjecture unsupported in the record, are insufficient to raise a genuine issue of material fact." *Thomas v. Metropolitan Life Insurance Co.*, 40 F.3d 505, 508 (1st Cir. 1994). The [*262] Court need not "credit purely conclusory allegations, indulge in rank speculation, or draw improbable inferences." *National Amusements*, 43 F.3d at 735.

In essence, the conversation between Martel and Sarawgi, consisted of Martel responding "no" when asked by Sarawgi if he saw any reason why Plaintiff's dismissal was not justified. Based upon these particular circumstances, the extent of Martel's "involvement" in the appeals process was neither arbitrary nor unreasonable. [**32] See *Ross-Simons*, 66 F. Supp. 2d at 329. The Court concludes that the limited conversation between Sarawgi, the appeal officer, and Martel, a Dean of the university, does not rise to the level of a breach of the duty of good faith and fair dealing as it relates to the Plaintiff's appellate rights.

Moreover, the student handbook provides that

[t]o request an appeal, you must submit a request in writing, by hand delivery or certified mail, to the appeal officer designated in the Conduct Review Notification and Record. *The request must be submitted within two business days from the date of the decision and must state clearly the basis for your appeal. Your appeal will be reviewed upon receipt*, and a decision concerning your appeal will be available within a reasonable time. *The decision of the appeal officer will be final.*

Defendant Motion for Summary Judgment Ex. 13 at 22 (emphasis in original). The handbook does not place any specific limitation on the scope of Sarawgi's review. The handbook provides that the "appeal will be reviewed upon receipt" and that the a decision "will be available within a reasonable time." These general provisions [**33] do not limit JWU's "broad discretion" in implementing its internal appeals process in any significant manner. See generally *Gorman*, 853 A.2d 34; see also *Schaer v. Brandeis University*, 432 Mass. 474, 735 N.E.2d 373, 381 (Mass. 2000) (courts are "chary about interfering with academic and disciplinary decisions made by private colleges and universities") (internal quo-

tation marks and citation omitted). The Student Affairs Office received Plaintiff's appeal on September 27, 2004, and Sarawgi rendered her decision on September 29, 2004. The Court concludes that Plaintiff received the process he was entitled to under the relevant provisions of the student handbook. Accordingly, the Court finds no breach and JWU's motion for summary judgment with respect to the breach of contract claim is granted.

IV. Conclusion

For the foregoing reasons, JWU's motion for summary judgment is GRANTED.

SO ORDERED.

Mary M. Lisi

Chief United States District Judge

May 11, 2007