IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

YUNSONG ZHAO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No.: 7:18-CV-189
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY ("VIRGINIA TECH"), et al.	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Mr. Zhao brings this Motion for a Preliminary Injunction pursuant to 42 U.S.C. § 1983 for the ongoing violation of his Constitutional rights under the Fourteenth Amendment of the U.S. Constitution to be provided adequate due process before being deprived of fundamental rights. In support of his Motion, Plaintiff presents the following:

INTRODUCTION

The process that Mr. Zhao was due under the Virginia Tech Student Code of Conduct is the right to be present and heard, including the right to present evidence, based on the university's own definitions, which would have easily exonerated Mr. Zhao before impartial decision makers. For example, one violation the university claims Mr. Zhao committed is the storage of a knife longer than four inches in a car located on campus. But what the University

deprived Mr. Zhao of demonstrating—by intentionally excluding him from his own hearing—is the ability to challenge the university's allegation based on its own definition of a weapon. The Code of Conduct states:

> Unauthorized possession, storage, or control of firearms, weapons, **on university property**, including storing weapons in vehicles on campus as well as in the residence halls [sic].[1]

Significantly, the Code defines the term "weapon." Mr. Zhao's knife, which he estimates measures 4.7 inches,[2] meets the definition of "other weapon" as defined by the Code:

> **Other weapons** are defined as any instrument of combat or any object not designed as an instrument of combat but carried ***for the purpose of inflicting or threatening bodily injury.*** Examples include but are not limited to **knives** with blades longer than 4 inches, razors, metal knuckles, blackjacks, hatchets, bows and arrows, nun chukkas, foils, stun weapons, or any explosive or incendiary device. Possession of realistic replicas of weapons on campus is prohibited.[3]

The plain reading of that language demonstrates that the "other weapon" must be used "for the purpose of inflicting or threatening bodily injury."[4]

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[1] Exhibit 1, "Weapons," Student Code of Conduct, VIRGINIA TECH HOKIE HANDBOOK (emphasis in original).
[2] It is worth noting here that, due to Virginia Tech's refusal to reschedule Mr. Zhao's student conduct hearing, he has not had an opportunity to measure the blade of the knife for himself. Mr. Zhao asserts that the knife is approximately 12 centimeters, which equates to 4.7 inches. The police report noting the knife during execution of Virginia Tech's search warrant states that the knife blade is 5 inches long.
[3] See Exhibit 1, "Weapons" (Second emphasis added).
[4] Id.

Undoubtedly, the university never proved that Mr. Zhao had a 4.7 inch knife "for the purpose of inflicting or threatening bodily injury." Thus, failing to permit Mr. Zhao the opportunity to demonstrate that the university failed to prove the elements required for an "other weapons" violation, from its own Code of Conduct, highlights the injustice in this case.[5]

Moreover, Virginia Tech compounded the problem of never proving that Mr. Zhao had a 4.7 inch knife "for the purpose of inflicting or threating bodily injury" by basing the denial of his only appeal on false information, that was known to be false by the decision-making officials.[6] Virginia Tech then doubled-down on its unlawful conduct by attempting to alter recorded evidence after a lawsuit was filed.[7] Additionally, Mr. Zhao's dismissal from the university, with no opportunity to be heard, also resulted in the termination his lawful immigration status. (ECF 1, ¶ 76).

PROCEDURAL POSTURE AND RELEVANT FACTS

Mr. Zhao filed his Complaint on April 25, 2018. Plaintiff served Defendants Settle, McClain, and Wilson on April 26, 2018 and Defendant Virginia Tech on May 4, 2018 in accordance with Rule 4 of the Federal Rules of

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[5] Id.
[6] Exhibit 2, "Response to disciplinary appeal (confidential)," March 7, 2018.
[7] Exhibit 3, Response of Frank Shushok, May 2, 2018 (responding to Mr. Zhao's Letter of Reconsideration, April 24, 2018, asking the Office of Student Conduct to reopen his case, pointing out the faulty evidence. Included as Exhibit 4).

Civil Procedure, within the allotted 90 days to affect service. (ECF 2). Defendants have not yet answered. Plaintiff incorporates the facts from paragraphs 1–85 of his Complaint into this section. (ECF 1.)

GENERAL STANDARD OF REVIEW FOR INJUNCTIVE RELIEF

Federal Rule of Civil Procedure 65 establishes the procedure for federal courts to grant preliminary injunctions. Fed. R. Civ. P. 65. The purpose of a preliminary injunction is "to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013) (citation omitted). Because of the extraordinary nature of injunctive relief, the Supreme Court has admonished that preliminary injunctions "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. National Resources Defense Council, 555 U.S. 7, 22 (2008).

A plaintiff seeking a preliminary injunction must satisfy each of the following four factors: (1) that the plaintiff is likely to succeed on the merits; (2) that the plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of equities tips in the plaintiff's favor; and, (4) that the injunction is in the public interest. League of Women Voters of N. Carolina v. N. Carolina, 769 F.3d 224, 236 (4th Cir. 2014) (citing Winter, 555 U.S. at 20).

First, a plaintiff must make a *clear* showing that he is likely to succeed on the merits of his claim. Winter, 555 U.S. at 20-22. The plaintiff "need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." Id. Here, Mr. Zhao can show a likelihood of success on the merits because he was not given adequate due process by Virginia Tech.

Likewise, a plaintiff must make a *clear* showing that it is likely to be irreparably harmed absent injunctive relief. Id. A clear showing requires that "a plaintiff must demonstrate more than just a 'possibility' of irreparable harm." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017) (quoting Winter, 555 U.S. at 22)). A plaintiff's injury must be substantial to warrant injunctive relief and the remedy of money damages must be insufficient. Di Biase, 872 F.3d at 230 (quoting Hughes Network Sys. v. Interdigital Communications Corp., 17 F.3d 691, 693 (4th Cir. 1991)). Only then may the court consider whether the balance of equities tips in the plaintiff's favor. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346-47 (4th Cir. 2009), vacated on other grounds, 559 U.S. 1089 (2010), reissued in part, 607 F.3d 355 (4th Cir. 2010), overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). In this case, Mr. Zhao will suffer an immediate irreparable harm because, without the reinstatement of his student status, he will likely be deported from the United States.

Third, to determine whether the defendant will suffer from an injunction in favor of the plaintiff, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Winter v. National Resources Defense Council, 555 U.S. 7, 24 (2008) (quoting Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987)). The court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." Yakus v. U.S., 321 U.S. 414, 441 (1941). Mr. Zhao will certainly suffer an irreparable harm in the absence of an injunction from this Court, and Virginia Tech will suffer no injury; the reinstatement of Mr. Zhao to Virginia Tech is conditioned upon him transferring to another university, so Virginia Tech will not be affected by Mr. Zhao's reenrollment.

Lastly, the public interest is an important concern when balancing the effects of a preliminary injunction. "[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." Id. The court must pay particular regard to the public consequences of employing the extraordinary relief of injunction. Real Truth About Obama, 575 F.3d at 347.

A. Evidentiary Standard for Preliminary Injunction

Preliminary injunctions are governed by less strict rules of evidence than summary judgment or trial and are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); see also Elrod v. Burns, 427 U.S. 347, 350 n. 1 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the motion for a preliminary injunction").

In G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., the Fourth Circuit reversed a district court order and found that although admissible evidence may be more *persuasive* than inadmissible evidence in the preliminary injunction context, it was in error for the district court to summarily reject the movant's proffered evidence because it may have been inadmissible at a subsequent trial. 822 F.3d 709, 725 (4th Cir.), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded on other grounds, 137 S. Ct. 1239 (2017).

Also in G.G. ex rel. Grimm, the Fourth Circuit found that district courts may look to, and in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted. 822 F.3d 709, 725–26 (reasoning that "[b]ecause preliminary injunction proceedings are informal ones designed to prevent irreparable harm

before a later trial governed by the full rigor of usual evidentiary standards"). There the court joined the seven sister circuits who had considered the issue and found the same. Id. The court found that in preliminary injunction proceedings the nature of evidence as hearsay goes to "weight, not preclusion" and sister circuits have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." Id. (citations omitted).

B. Fundamental rights and immunities

Matters involving fundamental rights are reviewed with strict scrutiny and the state bears the burden to prove that the conduct is (1) necessary to achieve a compelling governmental purpose; (2) which is the least restrictive means to achieve the purpose; (3) that no less burdensome means exist to accomplish the purpose; and (4), is narrowly tailored to achieve the purpose. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Palko v. Connecticut, 302 U.S. 319 (1937); Griswold v. Connecticut, 381 U.S. 479 (1965). Mr. Zhao has a vested property interest in his enrollment at Virginia Tech. Doe v. Alger, 228 F. Supp. 3d 713, 728 (W.D.V.A. 2016). Thus, all proceedings that strip him of his fundamental right to property must provide adequate due process and that process must survive strict scrutiny. Meyer, 262 U.S. 390; Pierce, 268 U.S. 510; Palko, 302 U.S. 319; Griswold, 381 U.S. 479.

C. Sovereign and Qualified Immunity

Actions against state officials in their official capacity are not against the official, but against the state. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Defendant Settle, in his official capacity, as well as Defendant Virginia Tech are therefore entitled to the same grant of sovereign immunity that would be granted to the state. Kentucky v. Graham, 473 U.S. 159, 166 (1985). To defeat sovereign immunity, Plaintiff must show that the state "entity itself is a 'moving force' behind the deprivation" of his federal right. Id. (quoting Polk County v. Dodson, 454 U.S. 312, 326 (1981)). Therefore, the state entity's "'policy or custom' must have played a part in the violation of federal law." Id. (quoting City of Oklahoma City v. Tuttle, 471 U.S. 808, 819 (1985)).

That said, when a party is requesting prospective relief for an ongoing violation of federal law, the sovereign immunity granted by the Eleventh Amendment does not apply. Ex Parte Young, 209 U.S. 123 (1908). The moving party need only show that the violation of a federal law is continuous and that the relief being sought is prospective in nature. Verizon Md., Inc. v. Public Service Comm'n of Md., 535 U.S. 635, 645 (2002).

In contrast to actions against state officials in their official capacity, actions in their personal capacity trigger an analysis of qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982). But when Plaintiffs seek injunctive relief against

public officials in their official capacity, qualified immunity does not apply. Id. at 819 n. 34. See Raub v. Campbell, 785 F.3d 876, 885 (4th Cir. 2015).

In this case, Plaintiff defeats sovereign immunity and qualified immunity because he can show that his fundamental rights to liberty and due process are being violated and seeks prospective relief. Plaintiff asks this Court to reinstate his student status at Virginia Tech University, so he can reapply for an F-1 Student Visa, on the condition that he transfer to another university.

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiff can show a likelihood of success on the merits.

At the outset, this Court has held that enrollment in a public university in Virginia is an implied contract, creating a vested property interest. Doe v. Alger, 228 F. Supp. 3d 713, 728 (W.D.V.A. 2016). Relevantly, as a student of Virginia Tech, Mr. Zhao had a contract with Virginia Tech. Id. Defendants Virginia Tech and Settle breached their contract with Mr. Zhao, and thus violated Mr. Zhao's due process rights by (1) holding a hearing while knowing Mr. Zhao could not attend that hearing to defend himself, and by (2) denying his appeal despite knowing that Defendants held a hearing in Mr. Zhao's absence.[8] (ECF 1, ¶¶ 68–80).

[8] Exhibit 2, "Response to disciplinary appeal (confidential)."

Undoubtedly, Mr. Zhao has more at stake than the average university student. Not only was his enrollment terminated while he was incarcerated and unable to attend his Student Conduct hearing, but his lawful immigration status was terminated as well. (ECF 1, ¶ 76). Plaintiff now faces deportation while being held at an immigration detention center, because Virginia Tech expelled him without an opportunity to be heard. Id. at ¶ 77.

a. Legal Standard

The Fourteenth Amendment of the Constitution protects the right to property and requires that due process be given before deprivation of that property. U.S. CONST. AMEND XIV. The basic principles of due process are notice and a meaningful opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Though the Fourteenth Amendment protects the right to property, it does not create an interest in property. Goss v. Lopez, 419 U.S. 565, 572 (1975). The property interest must be created by another source, such as state law. Id.

One way that a property interest can be created is through the creation of a contract, whether express or implied. Bishop v. Wood, 426 U.S. 341, 344 (1976). The Supreme Court extended that contractual protection to education in Regents of Univ. of Mich. v. Ewing. 474 U.S. 214, 222 (1985). This Court has held that enrollment in a public university in Virginia is an implied contract, creating a

vested property interest; the legal analysis under Virginia law is explained in Doe v. Alger. 228 F. Supp. 3d 713, 728 (W.D.V.A. 2016).

In Doe, Plaintiff asserted that he had an implied contract with James Madison University ("JMU") that was created when he paid his tuition and accepted JMU's offer of acceptance to the university. Id. The court in that case explains that, indeed Plaintiff Doe had an implied-in-fact contract with JMU, which created a property interest in Doe's continued enrollment at JMU. Id. Implied-in-fact contracts can be enforced against the sovereign of Virginia as long as the contract is based on a mutual understanding by both parties. Id. (quoting Sabet v. E. Va. Med. Auth., 775 F.2d 1266, 1270 (4th Cir. 1985)).

Additionally, "[i]n the context of student discipline, the Due Process Clause requires 'notice and an opportunity to be heard.'" Tigrett v. Rector and Board of Visitors of the Univ. of Va., 137 F. Supp. 2d 670, 674–75 (W.D.V.A. 2001). The test to determine the adequacy of due process from Mathews v. Eldridge weighs the following factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mallette v. Arlington County Employees Supplemental Retirement System II, 91 F.3d 630, 640 (4th Cir. 1996) (quoting Mathews, 424 U.S. at 335)).

Regarding Mr. Zhao's private interest, courts traditionally give academic disciplinary proceedings deference when analyzing the effect of the official action on the private interest. Butler v. Rector and Bd. Of Visitors of College of William and Mary, 121 Fed. App'x 515, 519 (4th Cir. 2005) (citing Tigrett v. Rector and Board of Visitors of the Univ. of Va., 290 F.3d 620, 627 (4th Cir. 2002)). In this case, however, the private interest far outweighs the official action.

Further, the Supreme Court in Goldberg v. Kelly held that, prior to the termination of a vested property interest, an individual must be given an opportunity to address the evidence presented against him and confront adverse witnesses to satisfy due process. 397 U.S. 254, 269–70 (1970). Goldberg relied on the assertion that the opportunity to be heard is a pillar of due process and that the hearing must be meaningful to fulfill the process guaranteed by the Fourteenth Amendment. Id. at 267–68 (quoting Armstrong v. Manzo, 380 U.S. 385, 394 (1965)). The Goldberg Court explains:

> In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and **an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.** These rights are important in cases such as those before us, *where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.* Id. (Emphasis added).

a. Application of the relevant law to the facts in Mr. Zhao's case shows that Virginia Tech did not provide adequate due process.

Virginia Tech offered Mr. Zhao the opportunity for an education; consequently, an implied-in-fact contract was created when Mr. Zhao paid his tuition and began his enrollment. Doe, 228 F. Supp. 3d at 728. Once that contractual relationship began, Mr. Zhao was subject to the terms of the "Hokie Handbook," which contains Virginia Tech's Code of Student Conduct.[9] Id. In the Hokie Handbook, Virginia Tech sets forth the following *minimum protections* for due process in formal student conduct hearings:

> In formal conduct hearings, a student or organization is entitled to the following procedural guarantees:
>
> 1. The student or organization will be provided with a written statement of charges sufficiently in advance of the hearing and in reasonable detail **to allow the student or organization to prepare a case for the formal hearing.**
> 2. Although students or organizational representatives may remain silent during a formal hearing, **they may choose to refute or question any information or witnesses and will be given an opportunity to present a rebuttal to the charges and to produce witnesses or written statements on their own behalf.**
> 3. **To help them prepare their response**, students or organizational representatives may choose an advisor, who may be present at the formal hearing but may not participate in the proceedings. The advisor's role is specifically limited to conferring with her or his advisee. When the formal hearing involves an assault or any complaint where a student is the referral agent, and/or an alleged victim, the complainant and accused student may have a support person or advisor present throughout the formal hearing, but the support person may not participate in the process.

[9] Exhibit 1; Exhibit 5, The University Conduct System, VIRGINIA TECH HOKIE HANDBOOK.

4. At a formal hearing, **the student or organizational representative may challenge the objectivity of any committee member or administrator, given reasonable cause to believe that the member may be biased or have a conflict of interest.** (In the case of a committee formal hearing, the committee advisor will make a final ruling on any such challenge.)

(Emphasis added).[10]

Since Defendants intentionally held Mr. Zhao's disciplinary hearing in his absence, Mr. Zhao never had the opportunity—at his hearing— "to refute or question any information or witnesses."[11] Nor was Mr. Zhao "given an opportunity to present a rebuttal to the charges and to produce witnesses or written statements on [his] own behalf."[12] For example, these Defendants wholly failed to present evidence that Mr. Zhao possessed a knife longer than four inches "for the purpose of inflicting or threatening bodily injury,"[13] as required by the definition of Defendants' own policy. (ECF 1, ¶¶ 59–67, 71). But even if Defendants did present evidence of such intent on the behalf of Mr. Zhao, by intentionally holding the hearing in Mr. Zhao's absence, these Defendants never gave Mr. Zhao "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"—as

[10] Exhibit 5, "Provisions for Procedural Guarantees," The University Student Conduct System, VIRGINIA TECH HOKIE HANDBOOK.
[11] Id.
[12] Id.
[13] Exhibit 1, "Weapons."

required by both governing law and Defendants' own Student Handbook.[14] Goldberg, 397 U.S. at 267–68; (ECF 1, ¶¶ 68–71).

In the same vein of trampling Mr. Zhao's due process rights by intentionally holding his disciplinary hearing in his absence, these Defendants consequently never, "[a]t a formal hearing," provided Mr. Zhao the opportunity to "challenge the objectivity of any committee member or administrator, given reasonable cause to believe that the member may be biased or have a conflict of interest."[15] (ECF 1, ¶¶ 68–71). This is especially relevant now, upon request of a new hearing, because any member who rubber stamped the expulsion of Mr. Zhao based on known false information definitely has demonstrated a lack of "objectivity" that gives "reasonable cause to believe that the member may be biased or have a conflict of interest."[16]

Moving on to Mr. Zhao's private interest under the Mathews analysis, Mr. Zhao has a property interest in his enrollment at Virginia Tech, and thus he also has a private interest in maintaining his student visa status, which is inextricably connected to his private interest of remaining in the United States to finish his education. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Doe v. Alger. 228 F. Supp. 3d 713, 728 (W.D.V.A. 2016); (ECF 1, ¶¶ 76–77). Mr. Zhao also has a liberty

[14] See Exhibit 5.
[15] Id.
[16] Id. See Exhibit 2.

interest against being wrongfully imprisoned. Again, these interests far outweigh the interest of Virginia Tech in continuing to double down on its *star chamber proceedings,* which led to Zhao's expulsion—without due process— in his absence, based on known false information.[17] (ECF 1, ¶¶ 70–77, 81–85).

Next in the Mathews analysis, the risk of erroneous deprivation in this case is high. 424 U.S. at 335. Indisputably, Mr. Zhao did not have an opportunity to rebut any evidence presented against him. (ECF 1, ¶¶ 68–71). Mr. Zhao's right to be heard is absolutely based on his implied contract with the university; but, just as important, is the fact that zero evidence exists to support any allegation that Mr. Zhao possessed a 4.7 inch knife "for the purpose of inflicting or threatening bodily injury."[18] Doe, 228 F. Supp. 3d at 728; (ECF 1, ¶¶ 59–67). Again, the decision to expel Mr. Zhao was based on knowingly false information, information that—had he been present to defend himself—Mr. Zhao could have easily corrected on the record.[19] (ECF 1, ¶¶ 81–85). These erroneous findings of fact were held against Mr. Zhao, causing his expulsion. Id. On top of these alarming issues, Virginia Tech denied Plaintiff's only appeal based on the same

[17] See id.
[18] Exhibit 1, "Weapons."
[19] Exhibit 5.

false information. Id. The Virginia Tech Student Conduct system offers no further recourse to students whose appeals are denied.[20] Id.

In sum, the indisputable evidence demonstrates that, far from a risk of erroneous deprivation of Mr. Zhao's Constitutional rights: an actual deprivation of his Constitutional rights has, in fact, occurred at the hands of Defendants Virginia Tech and Settle. Mathews, 424 U.S. at 335; (ECF 1, ¶¶ 49–85).

Lastly, Virginia Tech has a constitutional interest in providing Mr. Zhao with the process he was due under both the U.S. Constitution and the binding contract between the parties. U.S. CONST. AMEND. XIV; Doe, 228 F. Supp. 3d at 728. Virginia Tech, and every student subject to its Code of Student Conduct, has an interest in accurate fact-finding—fact-finding that forms the basis of disciplinary action against students.[21] Simply put, Virginia Tech suffers no harm from reinstating Mr. Zhao—while ordering a new hearing. Comparing the facts here to those in Doe v. Alger drives this point home. 228 F. Supp. 3d 713 (W.D.V.A. 2016).

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[20] Plaintiff, after exhausting his only appeal, did request that the Office of Student Conduct reopen his case. Mr. Zhao sent a letter of reconsideration to Defendant Settle before this lawsuit was filed, pointing out the erroneous information used to expel Mr. Zhao in his absence (Exhibit 4). In the reply, the Office of Student Conduct denied the request to reopen Mr. Zhao's case and stated that his expulsion is final. In that letter, they also altered the rationale for their decision after this lawsuit was filed (Exhibit 3).

[21] See Exhibit 5.

In Doe, the Student Conduct hearing proceeding at JMU was found to provide inadequate due process for two reasons. Id. First, the Appeal Board at JMU did not give Doe any reasons for reversing a favorable decision found by the initial hearing and imposing a sanction on Doe. Id. at 730. Second, Doe was not allowed to be present during the hearing by the Appeal Board. Id. at 731.

Here, analogous to Doe in many ways, rather than giving no explanation for its decision, these Defendants provided an explanation for expulsion and denial of Mr. Zhao's appeal that was erroneous, because the explanation was based on known, false information. (ECF 1, ¶¶ 81–85). Also, similarly to Doe, Mr. Zhao was not present at his hearing because Student Conduct did not honor his request to reschedule the hearing. Id. at ¶¶ 68–71. Respectfully, it's shocking that Defendants would even argue Zhao's due process rights have not been violated, and to violate his due process rights—while also facilitating the violation of his liberty interest against erroneous jailing and deportation—makes Defendants conduct all the more reprehensible.[22]

Indisputable evidence demonstrates that Mr. Zhao had a right to be heard at his own disciplinary hearing; yet, Defendants intentionally held the hearing in his absence, and then put in writing known false facts as the basis for Mr. Zhao's

[22] Defendant Settle signed Mr. Zhao's expulsion. See Exhibit 6, "Formal Hearing Decision," February 5, 2018.

expulsion and denial of his appeal.[23] (ECF 1, ¶¶ 49–85). Therefore, the likelihood for success on the merits because readily apparent. Winter v. National Resources Defense Council, 555 U.S. 7, 22 (2008).

II. Plaintiff is suffering an ongoing irreparable harm because he is still in detention since his lawful immigration status has lapsed based on Defendants' failure to provide him adequate due process and is facing the possibility of deportation from the United States.

Imminent irreparable harm is exceptionally easy for Plaintiff to show, as Plaintiff is being held in immigration detention and is facing the very real possibility of deportation. Winter 555 U.S. at 22; Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017). Since Virginia Tech refused to give him due process before expelling him, Mr. Zhao now has no immigration status to remain in the United States. (ECF 1, ¶ 76). No amount of money damages can remedy this deprivation of his liberty, and only an order from this Court can end this ongoing harm. Di Biase, 872 F.3d at 230.

III. The balance of the equities tips in Plaintiff's favor and Defendants will suffer no harm because Mr. Zhao's reinstatement is conditioned on his transfer to another university.

The injury to Plaintiff far outweighs any harm to Defendants. Winter, 555 U.S. at 24; Yakus v. U.S., 321 U.S. 414, 441 (1941). Mr. Zhao is being held without bail in federal custody because he was not given an opportunity to challenge the

[23] Id.; Exhibit 2.

case against him. (ECF 1, ¶ 77). His property interest in continuing his enrollment in university and his liberty interest in not being held in detention were taken from him unjustly. That injury is real and ongoing. Virginia Tech obviously does not want Mr. Zhao to remain a student on its campus; Student Conduct was very eager to expel Plaintiff without giving him a chance to rebut the evidence against him. (ECF 1, ¶¶ 68–75). Mr. Zhao, based on the way he was treated by Virginia Tech during his short time there, has agreed that he will not return to Virginia Tech as a student. Plaintiff simply asks for the opportunity to transfer to another university. Thus, there is no cognizable injury to Defendants Virginia Tech or Settle.

IV. Reinstating Mr. Zhao serves the public interest by remedying a denial of due process and allowing him to continue his college education.

Fundamentally, "it is always in the public interest to prevent the violation of a party's constitutional rights." G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383 (1979)). Here, issuance of a preliminary injunction will serve the public interest because Plaintiff's constitutional right to receive adequate due process has been violated. Yakus v. U.S., 321 U.S. 414, 441 (1941). The public benefits from state entities honoring fundamental constitutional

rights and honoring binding contracts. The public also has a general interest in the pursuit of higher education.

CONCLUSION

Defendants Virginia Tech and Settle violated Plaintiff's constitutional rights when they denied him the right to be present and heard at his Student Conduct hearing. Defendants then doubled down on the denial of Mr. Zhao's rights when they denied his only appeal based on false—and easily verifiable—information.[24] If Plaintiff would have been heard, he would easily have demonstrated that Defendants cannot meet their burden to show that Mr. Zhao had the 4.7 inch knife on campus "for the purpose of inflicting or threatening bodily injury."[25] In addition, in response to Mr. Zhao's request to reopen his case, Defendants changed the rationale for Mr. Zhao's dismissal, altering official university records after a lawsuit had been filed.[26]

Defendants' conduct has caused irreparable harm to Mr. Zhao, especially concerning the termination of his immigration status, continued detention, and fear of deportation. Based on these facts, Plaintiff can show (1) a likelihood to succeed on the merits of his claim; (2) a severe and ongoing irreparable harm

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[24] Exhibit 2.
[25] Exhibit 1, "Weapons."
[26] See Exhibits 2, 4, and 3. Exhibit 2, "Response to disciplinary appeal (confidential);" Exhibit 4, Request to Reconsider; Exhibit 3, Refusal to Reopen Case.

through his continued detention and imminent deportation; (3) that the balance of equities tips in favor of Plaintiff and Defendants will not suffer an injury upon granting this motion; and, (4) that respecting Plaintiff's due process rights is in the public interest. Mr. Zhao specifically requests that this Court order Defendants Virginia Tech and Settle to:

Restore Mr. Zhao to the state he was in before due process was denied him and:

(1) Immediately reinstate Mr. Zhao as a student in good standing at Virginia Polytechnic Institute and State University ("Virginia Tech");

(2) Allow him enough time to apply for and reinstate his F-1 student visa;

(3) Only once his F-1 visa is restored, grant him another student conduct hearing so he can attend, present evidence, and question witnesses.

For the reasons stated herein, Plaintiff prays this Honorable Court GRANT Mr. Zhao's Motion in its entirety.

Respectfully submitted this 10th day of May 2018,

s/MARIO B. WILLIAMS
Mario B. Williams
VSB No. 91955

s/LILLIE W. BLANTON
Lillie W. Blanton
VSB No. 91733

NEXUS DERECHOS HUMANOS ATTORNEYS, INC.
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303

(404) 654.0288/ (703)935-2453 FAX
mwilliams@ndhlawyers.com
lblanton@ndhlawyers.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

Respectfully submitted this 10th day of May 2018,

s/MARIO B. WILLIAMS
Mario B. Williams
VSB No. 91955

s/LILLIE W. BLANTON
Lillie W. Blanton
VSB No. 91733

NEXUS DERECHOS HUMANOS ATTORNEYS, INC.
44 Broad Street, NW, Suite 200
Atlanta, Georgia 30303
(404) 654.0288/ (703)935-2453 FAX
mwilliams@ndhlawyers.com
lblanton@ndhlawyers.com
Attorneys for Plaintiff