

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

JOSHUA CLAY OLIVER,

Plaintiff,

v.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,
D/B/A THE UNIVERSITY OF GEORGIA,
AND MICHAEL F. ADAMS IN HIS
OFFICIAL CAPACITY AS PRESIDENT
OF THE UNIVERSITY OF GEORGIA,

Defendants.

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* Civil Action File No.
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* 3:06-CV-110-CDL
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**DEFENDANTS' BRIEF IN SUPPORT OF THEIR REPLY TO PLAINTIFF'S
RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Michael F. Adams, in his official capacity as President of the University of Georgia ("the University"), and the Board of Regents of the University System of Georgia ("the Board"), d/b/a the University of Georgia, and hereby file this Reply Brief in support of Defendants' Motion for Summary Judgment and show this Honorable Court the following:

I. ARGUMENT AND CITATION OF AUTHORITY

A. Defendants neither arbitrarily nor unfairly denied the Plaintiff any liberty or property interest in continuing his education.

1. **Plaintiff does not have a substantive due process right to continue attending the University.**

The Defendants reiterate that Plaintiff is not entitled to substantive due process protection in his attempt to continue his education at the University. Plaintiff erroneously relies on Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) to support the proposition that he has such an interest. (Doc. 36 at 5). In Nash, however, the Court stated, "it is assumed by the parties and by the district court that appellants have property and liberty interests in their continued enrollment at Auburn University and that their interests enjoy the protections of due process. We will proceed to decide this appeal, making the same assumption, without expressing an opinion on the point." Id. at 660.

In further support of his substantive due process position, Plaintiff cites Dixon v. State of Ala. Bd. of Educ., 294 F.2d 150, 151 (1961). The question presented to the Court in that case, however, was whether due process required some degree of notice and opportunity for hearing before students could be expelled for misconduct, and the Court concluded that it did. See id. Contrary to Plaintiff's implications, the Court did not hold in Dixon that the students had a substantive due process interest in continuing their education. See id. Here,

Defendants do not assume that Plaintiff has a substantive due process right in continued enrollment at the University, and, in fact, argue that he does not.

In Fedorov v. The Bd. of Regents, 194 F. Supp.2d 1378, 1391 (S.D. Ga. 2002), the Court outlined the reasons as to why attending dental school did not entitle the Plaintiff to substantive due process protection. Those notable guidelines squarely apply to the instant case. First, the Georgia Supreme Court has held that education is not among the rights afforded explicit or implicit constitutional protection and is not a fundamental right. D.B. v. Clarke County Bd. of Educ., 220 Ga. App. 330, 330-31, 469 S.E.2d 438 (1996). Second, Defendants actions do not "shock the conscience." Fedorov, 194 F.Supp.2d at 1391. Plaintiff's suspension was reasonable and Defendants' findings were not arbitrary and capricious because Plaintiff entered a plea of guilty to aggravated assault with intent to rape and stated on his application that he had never entered a guilty plea. (See Doc. 29, Att. 1 at 20). Finally, the State created the opportunity to attend the University, not the Constitution. Fedorov, 194 F.Supp.2d at 1391. Accordingly, Plaintiff has failed to establish a substantive due process claim.

2. Defendants' actions did not arbitrarily or capriciously deprive Plaintiff of any assumed substantive due process rights.

To the extent that this Court may assume, as some Courts have in the past, that the Plaintiff has a protectable liberty or property interest in attending the University, the Defendants' actions have not deprived him of those interests, as they were neither arbitrary or capricious nor fundamentally unfair. In Nash, after agreeing with the parties and district Court's assumption of a substantive due process claim, the Court analyzed the due process clause's guarantee against arbitrary decisions that would impair constitutionally protectable interests. Nash v. Auburn Univ., 812 F.2d at 667-668. In its holding, the Court affirmed the district court's determination that there was substantial evidence to support the board's conclusion that the appellants were guilty of academic dishonesty. Id. at 668.

Likewise, this Court should find that there is substantial evidence to support the Panel's decision. The University's decision to suspend Plaintiff was based on his entry of a "guilty plea" on February 7, 2003, to aggravated assault with intent to rape. (Plaintiff's Depo., pp. 11, 57, Exhs. 28, 30-31). Specifically, the Panel stated that the basis of its decision was that Oliver "entered a plea of guilty under Alford

v. North Carolina and the University application inquires about a finding of guilty by a judge or jury, a plea of guilty, or a plea of nolo contendere. Thus, your situation is included under this definition requiring a response of yes." (November 17, 2006, Hearing, pp. 77-78).

3. **Defendants did not violate Plaintiff's procedural due process rights.**

Throughout his brief in response to Defendants' Motion for Summary Judgment, Plaintiff incorporates his contention that the Defendants' ultimate suspension decision was unfair with due process cases that actually address the requirement of fairness in the procedure afforded the student. (See supra section A.1. - argument relating to Dixon). Another example in his brief is when Plaintiff provides a block quote from Goss v. Lopez, 419 U.S. 565 (1975), and asserts that due process is not blind to just results. (See Doc. 36 at 7). He states that the Supreme Court revealed its concern in avoiding mistakes and arbitrary results in the Goss decision. (Id.).

Plaintiff misleadingly argues that this Court should rely on this language to rectify what he calls a "basic injustice" in the Panel's determination. (See id. at 8-9). Goss, however, is distinguishable and inapplicable here. A contextual review of the cited caselaw shows that the fairness language in Goss is

not addressing a suspension determination but, instead, the suspension process, including the timing and content of the notice and the hearing. See Goss, 419 U.S. 579-80.

Simply stated, Plaintiff does not like the outcome of his hearing, i.e. the suspension. He fails to challenge the procedure and the safeguards the Defendants employed to ensure that the process was fair and appropriate. Procedural due process is a guarantee of fair procedures whereby the State may not deprive a person of liberty or property without providing "appropriate procedural safeguards." Daniels v. Williams, 474 U.S. 327, 331, 337 (1986). Because the Defendants exercised fairness and safeguarded procedures during the notice and hearing stages of reaching their decision and because they made a determination that was not arbitrary or unfair, this Court cannot find that Plaintiff's substantive or procedural due process rights were violated.

4. The record is not required to show evidence of dishonesty, as there was no such finding.

Plaintiff erroneously alleges that the principles of equity should be applied because the Panel improperly dismissed him from the University for being dishonest and the dismissal publicly labels him as a convicted sex offender. (Doc. 36 at 9). According to Plaintiff, Kimberly A. Ellis, Associate Dean

of Students for Judicial Programs, and Dr. Patricia W. Daugherty, Assistant Vice President for Student Life, admitted that dishonesty was implicated in the Panel's decision and such a finding is therefore required. (Id. at 9-10).

Contrary to Plaintiff's assertions, Ms. Ellis's and Dr. Daugherty's statements do not sufficiently develop the record to show that the Panel was required to find proof of intent to deceive or dishonesty. Although Plaintiff grotesquely distorts their positions, their opinion as to whether a finding of dishonesty is required for Plaintiff's suspension is irrelevant and inadmissible. Here, this Court has the task of determining the issue of law, which is whether the Defendants violated Plaintiff's rights by suspending him for providing false information on his application.

Plaintiff was not dismissed for dishonesty, as he seeks to characterize it. The Panel found that he furnished false information on his application, and specifically stated that the false information was that he alleged that he had never entered a plea of guilty. (See Doc. 29, Att. 1 at 4-5). Possibly in consideration of Plaintiff's attempt to divert all responsibility for his answers by consulting with an attorney, the Panel offered "[w]ith regards to Regulation II(3), causing, condoning, or encouraging the completion of any university

record, document, or form dishonestly, we find you not in violation, as the panel found no intent to deceive in your actions." (Id.).

Further, Plaintiff cannot seek to fault the University for any stigma that he may receive based upon his guilty plea to aggravated assault with intent to rape, as that occurred prior to Plaintiff entering into a relationship with the University. In fact, the crux of the Defendants argument is that the Plaintiff had already acknowledged the incident by way of a guilty plea and he was therefore required to inform the University on his application. Accordingly, Plaintiff cannot prevail under the law or in equity.

B. Defendants did not violate Plaintiff's equal protection rights.

As to Plaintiff's equal protection argument, it must fail. Plaintiff is not part of a suspect class and there is no burden on a fundamental right. Castaneda v. Partida, 430 U.S. 482 (1977); Damiano v. Florida Parole and Probation Commission, 785 F.2d 929, 932-933 (11th Cir. 1986) citing Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976). Plaintiff has also failed to present any evidence that Defendants intended to discriminate against him. Greene v. Georgia Pardons and Parole Board, 807 F. Supp.748, 755 (N.D. Ga. 1992). Finally, the Defendants have

sufficiently established that there was a rational basis for Plaintiff's suspension. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356m 366-67 (2001). He provided false information on his application by failing to acknowledge that he had plead guilty to aggravated assault with intent to rape.¹

C. Plaintiff's Breach of Contract Claim is Barred by Sovereign Immunity.

In response to Defendants' motion, Plaintiff merely provides conclusory allegations that a contract existed between the parties. Plaintiff, however, fails to directly address the fact that the Code of Conduct, which allegedly is part of the written contract waiving sovereign immunity, has been included in its entirety in every University of Georgia Student Handbook. (Defendants' Statement of Material Facts,

¹ Plaintiff has provided absolute clarification that Defendant Adams has been sued in his official capacity only. (Doc. 36, pp. 12-13). Plaintiff, however, fails to provide any authority in support of his argument that the Board of Regents is a "person" subject to suit under 42 U.S.C. § 1983 and is not entitled to Eleventh Amendment immunity. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101-102, 121 (1984)(In the absence of consent, a suit in federal court in which a state or one of its agencies or departments is named as defendant is proscribed by the Eleventh Amendment regardless of the nature of the relief sought). In fact, Plaintiff appears to acknowledge the validity of Defendants' arguments by filing a Motion to Amend seeking to add eighteen (18) members of the Board of Regents "in his or her respective official capacity." (Doc. 40).

hereinafter "SMF," ¶ 24). During Plaintiff's tenure as a student, the Student Handbook has been changed/amended/reviseed each year and a new version of the handbook has been created for the applicable year. (SMF, ¶ 22).

Based on the disclaimer referenced in Defendants' brief and the fact that the handbook has been changed/amended/reviseed each year, there is clearly no intent by the Board of Regents to be bound by its contents. Plaintiff fails to even address the authority cited in Defendants' brief. See Gardner v. University of Memphis College of Business, 2003 Tenn. App. LEXIS 283 * 6-7 (2003)(No contract found where University Catalog contained disclaimer that it is not intended to state contractual terms and does not constitute a contract between the student and the institution) citing Ku v. State of Tennessee, 104 S.W.3d 870 (2002); Petty v. State of Tennessee, 2002 Tenn. App. LEXIS 193 * 4-5 (2002)(No contract found where catalog explicitly sets forth that its terms are subject to change without notice and that it should not be relied upon).²

In the case at bar, no express written contract exists between the parties showing a meeting of the minds between

² Defendants again note that they attached a copy of the Eleventh Circuit's decision in Neressa Carr v. Board of Regents, No. 07-10126, in which the Eleventh Circuit found that the district court properly granted summary judgment for the Board on Carr's state law breach of contract claim.

Plaintiff and the Board of Regents. Therefore, the Board of Regents is cloaked with sovereign immunity from suit.³

D. Plaintiff's Claim for Judicial Review Under the Administrative Procedures Act Must be Dismissed.

Plaintiff cites Board of Regents v. Houston, 282 Ga. App. 412 (2006) in support of his contention that he is entitled to administrative review. (Doc. 36, p. 17). The aforementioned authority actually supports Defendants' arguments and specifically cites the same authority. See Woodruff v. Georgia State Univ., 251 Ga. 232 (1983); Blaine v. Savannah Country Day Sch., 228 Ga. App. 224 (1997). In Blaine, the Court of Appeals declined to reverse a school's permanent expulsion of a student who had been found guilty of an honor code violation, holding:

It is restraint which stems from confidence that school authorities are able to discharge their academic duties in fairness and with competence. It is borne alike of the necessity for shielding the courts from an incalculable new potential for lawsuits testing every Latin grade and every selection for the safety patrol. It protects every teacher from the cost and agony of litigation initiated by pupils and their parents who would rely upon the legal process rather than the learning process. It protects every school system—all of them laboring under pressure of financing, personnel problems and student discipline,

³ Plaintiff cites Life Chiropractic College, Inc. v. Fuchs, 176 Ga. App. 606 (1985) but this case is obviously not applicable since it involved a private college not entitled to sovereign immunity from suit. Id. at 608. Fuchs is also distinguishable from the case at bar because there was no evidence of any disclaimer and/or a handbook that had been changed/amended/revised each year.

academic performance, tax payer revolt and patron unrest and the rising tide of recalls from an added and unbearable burden of continuous legal turmoil.

Blaine, 228 Ga. App. at 225 (citing Woodruff, at 234). The Court unequivocally held: "Absent plain necessity impelled by a deprivation of major proportion, the hand of the judicial branch alike must be withheld." Id. The Court concluded that the decision to expel the student "was not arbitrary or capricious, but a reasonable exercise of administrative and academic discretion." Blaine at 228.

In the case at bar, Plaintiff fails to show any "major deprivation" --only that he disagrees with the findings of the decision makers in this case and felt that the decision was harsh and unreasonable. See Blaine at 225. As such, this matter must be dismissed.

II. CONCLUSION

Based upon the foregoing, Defendants respectfully request that their Motion for Summary Judgment be granted. Defendants again respectfully request that this Court expedite a ruling on their Motion for Summary Judgment given that Plaintiff continues to attend the University of Georgia pursuant to an injunction.

(Signatures on next page)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2008, I electronically filed **DEFENDANTS' BRIEF IN SUPPORT OF THEIR REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 22nd day of February, 2008.

/s/RALPH W. ELLIS
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